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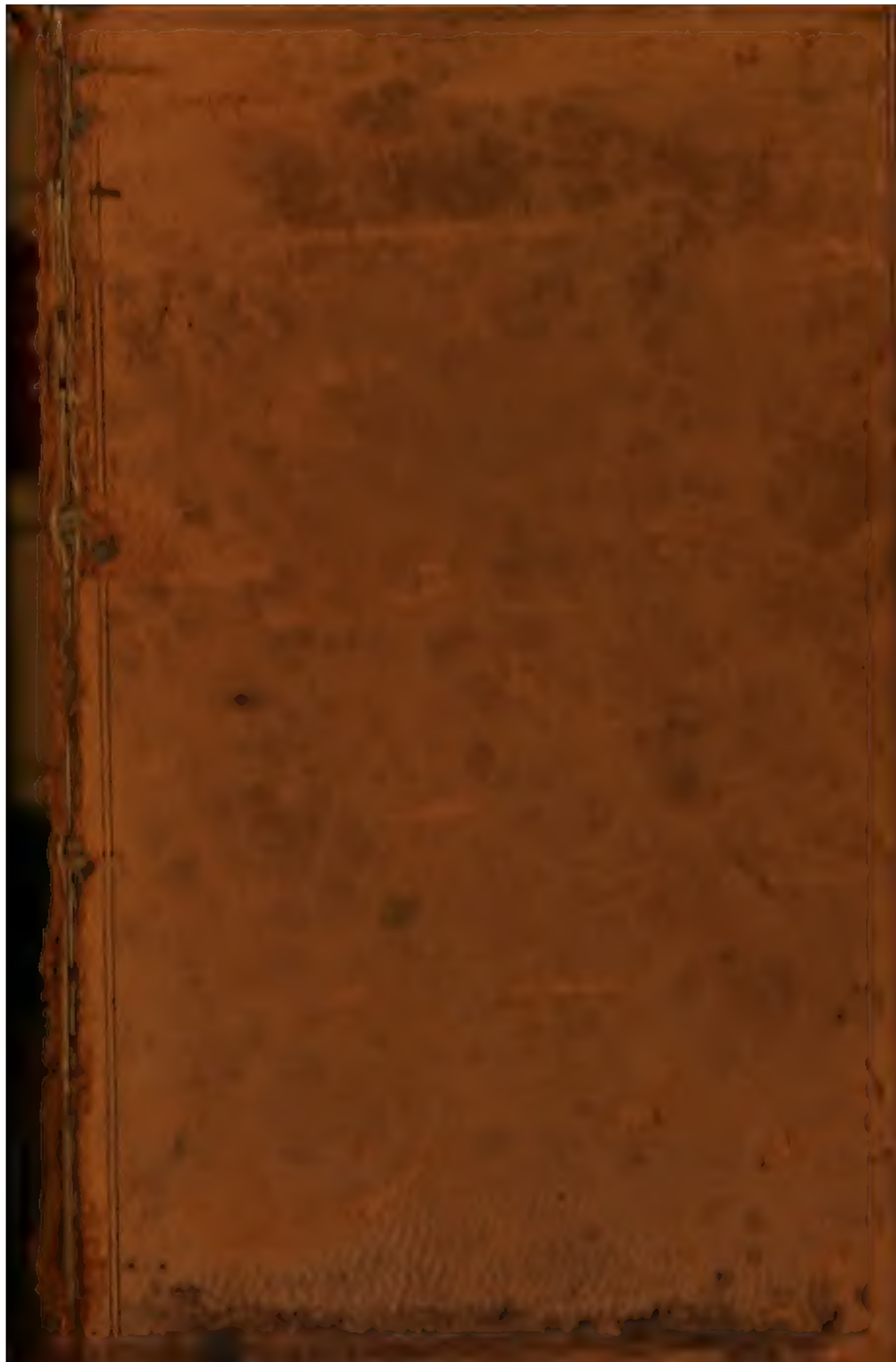
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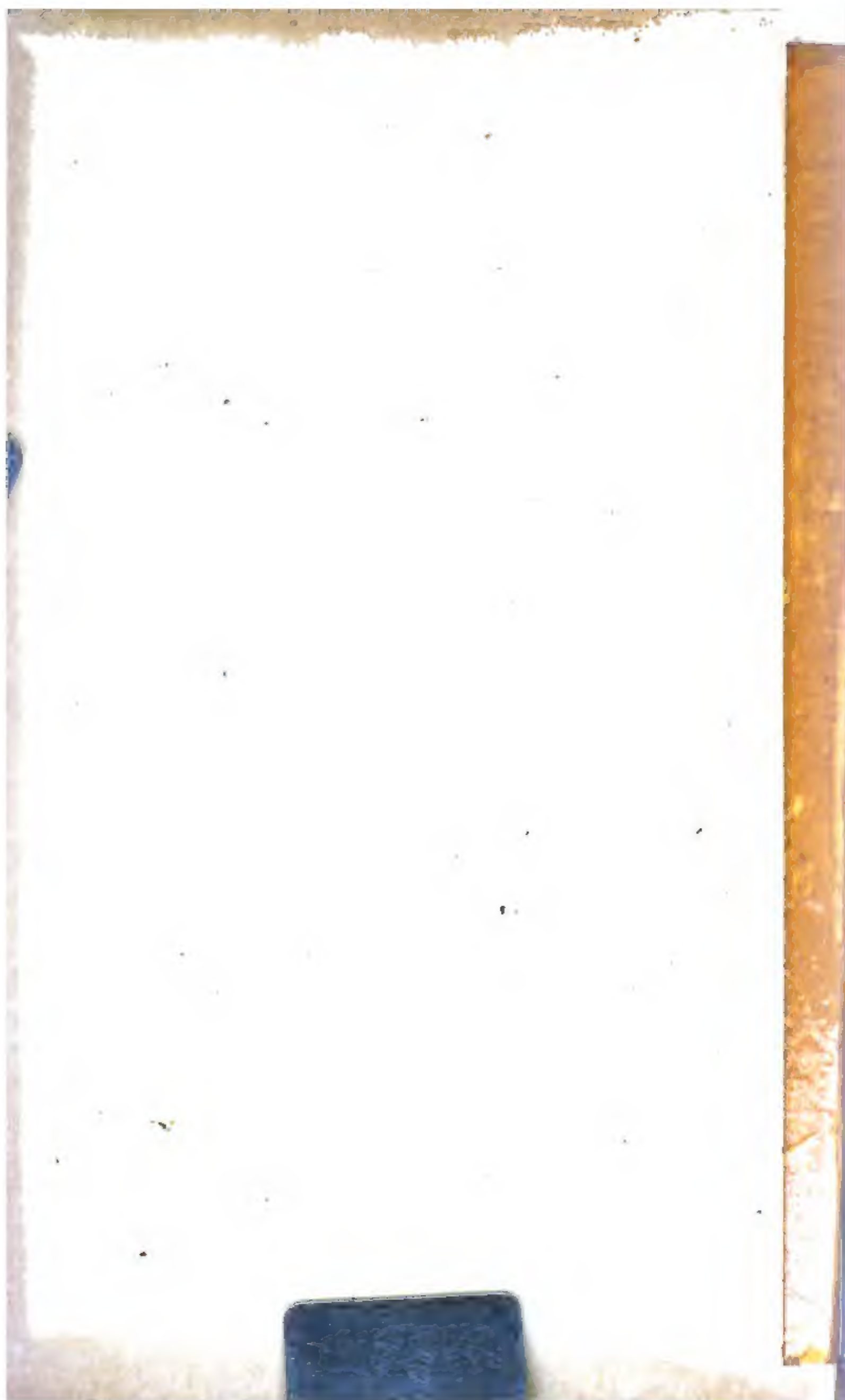
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CASES ON TORTS

SELECTED AND ARRANGED

FOR THE USE OF LAW STUDENTS

IN CONNECTION WITH

POLLOCK ON TORTS

BY

FRANCIS M. BURDICK,

Dwight Professor of Law in Columbia College.

Second Edition.

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BOOK I.

CHAPTER I.

THE NATURE OF TORT.

RICH v. N. Y. C. & H. Riv. R. Co.

(87 N. Y. 332. — 1882.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1879, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

R. W. Van Pelt for appellant.

William Allen Butler for respondent.

FINCH, J. We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident, as to make their practical separation somewhat difficult. (Moak's Underhill on Torts, 23.) The text writers either avoid a definition entirely (Addison on Torts), or frame one plainly imperfect (2 Bouvier's Law Dict. 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. (Cooley on Torts, 3, note 1; Moak's Underhill, 4; 1 Hilliard on Torts, 1.) By these last authors, a tort is described in general as "a wrong independent of contract."

And yet it is conceded that a tort may grow out of, or make part of, or be coincident with a contract (2 Bouvier, *supra*), and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. (Cooley on Torts, 90.) In such cases the tort is dependent upon, while at the same time independent of the contract; for, if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. (1 Addison on Torts, 13.)

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal, or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties, except that constituted by the contract itself, and then, insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that, therefore, the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, except that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties respectively would have a remedy, but none of which created any such rights as to lay the foundation for a charge of wilful misconduct or any other tortious act. Upon this theory

the case was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action, and that for a tort, and, therefore, something else, above and beyond and outside of a mere breach of contract, must be shown, and proof of such breach was immaterial. From every direction in which the plaintiff approached the allegations of his complaint, the same barrier obstructed his path and excluded his proof. Whatever may be true of the earlier agreements between the plaintiff and the railroad company, and conceding, what seems probable, that the evidence relating to them was properly rejected, on the ground that they left the defendant entirely at liberty to change the site of its depot, so that such change was in no respect either unlawful or wrong; there was yet a later agreement by the terms of which the defendant was bound, as soon as practicable and within a reasonable time, to restore the depot to its old location. The complaint explains the importance of such restoration to the plaintiff. It alleges that valuable property of his, heavily mortgaged, had depreciated in value in consequence of the removal of the depot, and could only be restored to something like its old value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site. The complaint further avers, that to secure this result, the plaintiff had surrendered valuable riparian rights to the defendant, but the latter, fully understanding the situation, maliciously and wilfully broke its agreement, and delayed a restoration of the depot for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure of the mortgage, and itself instigated such foreclosure and caused the ultimate sacrifice. For the breach of this contract to restore the depot within a reasonable time, the plaintiff had a cause of action. But this was not the one with which he came into court. His complaint was for a single cause of action, and that for a tort; and what that alleged tort was, it is quite necessary to know, and in what respect, and how it differs from a mere breach of contract, in order to determine whether the rejected proofs were admissible or not.

That a good cause of action, sounding in tort, was stated in the complaint was not denied upon the trial. Neither by demurrer nor by motion was the sufficiency of the complaint in any manner assailed. The second ground upon which a nonsuit was asked, practically confessed that there was good cause of action, but merely a failure to prove it. The ground stated was, "because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain alleged contracts; but the proof offered fails to make out any cause of action as set forth in the complaint." The opinion of the General Term distinctly concedes the point, saying, that the facts alleged made out "a clear case of fraud." And on the present appeal the learned counsel for the respondent explicitly admits, in his brief, that it was competent for the plaintiff, under the issue of fact joined by the pleadings, to give evidence of any of the alleged wrongful acts charged in the complaint, as a basis for the claim of damages which he asserted. There was, therefore, something to try; something which was susceptible of proof; a tortious act or omission, or a series of such acts or omissions, properly alleged in the complaint and open to the plaintiff's evidence. Why he was not permitted to have a single one of the forty questions put to his witnesses answered becomes, now, the important inquiry. It will not be necessary to consider them all, for many were excluded for a defect in their form, or because totally immaterial, or in the exercise of the proper discretion as to the order of proof, but enough remain, and may be grouped together, to raise the serious question argued at the bar.

The plaintiff offered to show the agreement of March, 1877, between himself and the railroad company, for the restoration of the depot to its original site within a reasonable time, and the breach of that agreement by the defendant company. The objection, put upon the ground that the offered proof was irrelevant and incompetent, was sustained and the evidence excluded. The plaintiff then sought to show how long a time elapsed, after the execution of the contract, before the depot was re-established at the foot of Main street; whether

an interval did occur, and how much time elapsed from the date of the contract to the building of the new depot, which evidence was also excluded as immaterial. A series of questions were further put, to show what the defendant did, if anything, in and about procuring plaintiff's mortgaged property to be sold and sacrificed under the mortgage; when the foreclosure took place; at whose instigation; and at what price, compared with its real value, the property was sold. These questions were excluded. The plaintiff also attempted to show that the re-establishment of the depot at the foot of Main street would have largely increased the value of his adjoining property covered by the mortgage. That evidence was rejected. The plaintiff was then asked if he had an interview with the officers of the defendant in reference to the removal and the re-establishment of the depot. This question was objected to, and the only ground assigned was, "as it is in writing." No proof of that was given; the case shows nothing but the assertion of the party objecting, and thereupon the witness was not permitted to answer the inquiry, whether he had an interview at all. He was then asked what reasons they assigned for removing the depot and refusing to bring it back, and this was excluded. And in the end the plaintiff was nonsuited because he had given no proof of a tort or a fraud. He now insists that he was first debarred from giving such proof, and then nonsuited because he had not given it.

The exclusion of proof of the contract for re-establishing the depot, and the wilful and intended breach of that contract, brings up for our consideration the question principally argued. Such exclusion must rest for its justification upon the theory of the defendant's counsel, already adverted to, which we are troubled to reconcile with his concession that a cause of action was alleged in the complaint. At the foundation of every tort must lie some violation of a legal duty, and, therefore, some unlawful act or omission. (Cooley on Torts, 60.) Whatever, or however numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended, or the means by which it was to be accomplished,

are shown to be unlawful. (*O'Callaghan v. Cronan*, 121 Mass. 114; *Mahan v. Brown*, 13 Wend. 261.) The one separate and distinct unlawful act or omission alleged in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate fact, may have been unkind or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and what it might lawfully do, it was not unlawful to ask it to do. The act of instigating the sale may be material and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but, in itself, it was not an unlawful act, and cannot serve as the foundation of a tort. (*Randall v. Hazelton*, 12 Allen, 412.) We are forced back, therefore, to the contract for re-establishing the depot and its breach as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a negligence that operates as such, and it is that fraud and that negligence which, at bottom, makes the breach of contract actionable as a tort. (*Coggs v.*

Bernard, 2 Lord Raym. 909; *Orange Bank v. Brown*, 3 Wend. 161, 162.)

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as is admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The General Term, as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other character of the relation constituted by the contract merely, for no such relation existed; and there must be some other relation not created by the contract alone, from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract, the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substitute a solid bridge. With the growth of its business, and the multitude of its trains, the draw had become a very great evil, and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand, the plaintiff was both a riparian owner above the draw, and likely to be injured in that ownership by a permanent bridge, and had suffered, and was still suffering, from a severe depreciation in the value of his property near Main street by the previous removal of the railroad station. The defendant was so far master of the situation, that it could and did shut up the plaintiff to a choice of evils. He might insist upon the draw, and leave his mortgaged property to be lost from depreciation, and save his riparian rights, or he might surrender the latter to save the former. This last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud, and no legal or actionable wrong on the part of the defendant.

If it drove a hard bargain, and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff, and he was free to contract or not as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: The railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This in itself was a perfectly lawful purpose. The grade crossing was a death-trap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. The plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this point, according to the allegations of the complaint, if at all, or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him of his damages by a complete sacrifice of his property. This plan was executed in this manner. The company wilfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full consideration of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save

it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee toward a foreclosure. But the defendant's direct instigation was added. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council, the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from the violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud; an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that and outside of that there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the cases referred to in the respondent's argument, but may spring from extraneous

circumstances, not constituting elements of the contract as such although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights as not to injure another. (*Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 188.) Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." It is no difficulty that the mortgagee's agreement to give time, and postpone the sale for plaintiff's benefit was invalid, and a mere act of grace which could not have been compelled. If it is made plain that the mortgagee would have waited but for the fraudulent scheme and conduct of the defendant, that is enough. (*Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 83.) Nor is it a difficulty that the injury suffered was the result of a series of acts some of which were lawful and innocent. (*Cooley on Torts*, 70; *Bebinger v. Sweet*, 1 Abb. N. C. 263.)

Assuming now that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause of action, it seems to us quite clear that the plaintiff was improperly barred from proving it. From the very nature of the

case a fraud can seldom be proved directly, and almost uniformly is an inference from the character of the whole transaction, and the surrounding and attendant circumstances. Proof of the contract and its breach, of the delay in restoring the depot and the reasons therefor, were essential links in the chain. If the proof should go no further, a nonsuit would be proper, but without these elements the tort alleged could not be established at all. And so the situation of the parties as it respected their several properties, the existence of the mortgage, the agreement to postpone the sale, were elements of the transaction proper to be shown. The plaintiff's interview with the officers of the defendant company, and their statement of the reasons for refusing to restore the depot were improperly excluded. While we cannot know what it was which actually occurred, it is very plain that their statement of reasons would bear materially upon the issues involved.

We are not concerned with the question of the wisdom of the plaintiff's choice of his form of action, or of what may result if the cause of action pleaded as a tort shall be hereafter assailed instead of its sufficiency being conceded. It may well be that he has chosen the one most difficult to maintain, and that an action upon one or more of the contracts would be less surrounded by difficulties. But we have nothing to do with his choice. He is entitled to prove his cause of action if he can.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except RAPALLO and MILLER, JJ., not voting.

*Judgment reversed.*¹

¹ Cf. *Dawe v. Morris*, 149 Mass. 188, where the plaintiff alleged that defendant, in order to induce the former to make a contract with a railroad company to build a section of its road, falsely represented that he and another had bought enough rails at a certain price to build it, and that if plaintiff would enter into the contract, they would sell these rails to him at the same price: that plaintiff relying on these representations entered into the contract: that defendant had not purchased the rails, and did not sell, and did not intend to sell the rails to plaintiff. *Held*, that plaintiff's cause of action was for breach of contract and not for tort.

Hutchins v. Hutchins, 7 Hill, 104, illustrates the proposition in the prin-

SHEEHORN v. DARWIN.

(1 Treadway, (S. C.) 196. — 1812.)

THIS was a special action on the case. The declaration alleged, that the plaintiff had a judgment, and *capias ad satisfaciendum*, against James Darwin, Jun. Upon the *ca. sa.* he was in custody.

That James Darwin, Jun., contrary to the will of the sheriff escaped; and that James Darwin, Sen., knowing the premises, and to injure the plaintiff, and to prevent him from having satisfaction of his judgment, did during the escape and eloignement of James Darwin, Jun., harbor, comfort, hide and secrete him; and aided and assisted to keep him away from, and to elude the search of the sheriff; and that he furnished him with horses, money, clothing, etc., to go away where the sheriff could not find or track him, and that during the said eloignement, the escape, to prevent the sheriff from taking the said James Darwin, Jun., he falsely affirmed, to the sheriff, that the said James Darwin, Jun., was not in the house of the said James Darwin, Sen., when in fact he was in the house; whereby the plaintiff lost his damages recovered, etc. Demurrer to the declaration and joinder. The court supported the demurrer.

The plaintiff moved the Constitutional Court at Columbia, to reverse the decision, and to overrule the demurrer, on the ground that the facts, set forth in the declaration, show a good and lawful cause for action.

CALCOCK, J. This action cannot be supported, either by precedent or principle. I have never read, or heard of such an

cipal case that "at the foundation of every tort must be some unlawful act or omission." Here the defendants, by false representations concerning the plaintiff, induced a third party to revoke his will, devising valuable property to plaintiff, and to execute another, depriving him of all the benefits which would have accrued under the first will. Yet it was held that the plaintiff had sustained no *legal* harm — he had no legal interest in the property mentioned in the first will — nothing but a mere naked possibility "which is altogether too shadowy and evanescent to be dealt with by courts of law."

action ; though such occurrences must frequently take place, nor does it bear any analogy to cases quoted. There is no privity of contract between the parties, no consideration moving the defendant, no responsibility on him to the plaintiff ; and no injury done to him, by the express showing of the plaintiff himself ; for supposing that he lost his debt by the escape, he has a remedy against the sheriff, and therefore he at all events, has sustained no injury by the harboring, as it is styled. And further, it is not certain that he would have retaken him, had he been told he was in the house ; nor if he had retaken him, is it certain that he would have obtained his money, for he might have taken the benefit of the Act. The court would not be induced to establish a new form of action, without manifest necessity, and none such appears in this case. I am therefore against the motion.

BORLEY v. WALFORD.

(9 Q. B. 197. — 1846.)

LORD DENMAN, C. J. The declaration, in substance, states that the plaintiff was a dealer in printed silk goods, and had sent the defendant divers lots of such goods, the last of which contained handkerchiefs which had been printed by plaintiff with a certain ornamental pattern, and that he was about to print others in the same manner for profit, all which was known to the defendant ; yet defendant, contriving and craftily and subtilely intending to deceive, injure, and defraud the plaintiff, and to induce him to desist from so printing the same, and deprive him of the profits, and to acquire the same for his own sole use and benefit, and put him to great and unnecessary expense, falsely, fraudulently and deceitfully represented and affirmed to the plaintiff, of and concerning the said last lot, and the said handkerchiefs, that in the said last lot there was a copy of a registered pattern, and that the parties intended to proceed against the plaintiff in the most expensive manner, by injunction and order through the Court of Chancery (thereby

meaning that the said pattern was a copy of a pattern registered according to the statutes, etc.), whereas in fact no such pattern had been registered, etc. And no parties did so intend as the defendant well knew : in consequence of which false representation plaintiff was induced to take a long journey, from Glasgow to London, for the purpose of inquiring into these matters, and of satisfying such supposed parties, and was hindered in his trade, and refrained from making goods of that kind according to orders theretofore received, etc.

To this declaration the defendant demurred generally.

The judgment which was given in this court in *Evans v. Collins*, affirming the proposition that every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action, has been overruled by the Court of Exchequer Chamber (*Collins v. Evans*, 5 Q. B. 820), which did not deny the authority of *Humphreys v. Pratt*, 5 Bligh, N. S. 154, in the House of Lords, but thought it might be distinguished from *Evans v. Collins*. Whether, in point of reasoning, that distinction is very satisfactory, we need not inquire ; for, having been established by the Court of Error, it must prevail. And, on the more general subject, we must admit the reasonableness of the doctrine there at length laid down. For, if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbor for any mode of communicating erroneous information, such, for example, as having a conspicuous clock too slow, since plaintiff might be thereby prevented from attending to some duty, or acquiring some benefit. A doctrine creating legal responsibility in cases so numerous and so free from blame must be restrained within some limits. But an averment that the falsehood of this representation was known to him, and that he knowingly and willfully uttered it, seems to carry the matter somewhat farther. If indeed the defendant were under any legal obligation to state the truth correctly to the plaintiff, there would be a grievance in misleading him, for which an action on the case would lie : still more so if he made the false representation, with a view to some unfair advantage to himself. Now here, on minutely examining the allegations, though

not very scientifically made, we think it sufficiently appears that the defendant uttered knowingly a deliberate falsehood on this subject, with a view to his own lucre. It is averred that he did so, with the design to deprive the plaintiff of the benefit of the last lot of goods, and to acquire it for his own sole use : and it is very plain that this object might have been effected in the manner alleged, (by deterring plaintiff from bringing his goods into the market.) The defendant has no right to say that the plaintiff was wrong in giving him credit for the truth of what he said ; and there is no doubt that the special damage naturally flowed from the plaintiff's confidence in the defendant's false assertion. We think, therefore, that the plaintiff has stated a good cause of action ; and the demurrer must be overruled.

TAYLOR v. M. S. & L. RY.

(11 Times Law Reports, 27. — 1894.)

LORD JUSTICE LINDLEY. This is an action brought in the High Court by the plaintiff, who was a passenger by the defendant Co.'s railway, to recover damages for an injury sustained by the negligence of the defendant's servant in slamming the door and jamming the plaintiff's hand. He recovered a verdict for £20 ; and now comes the question whether he is entitled to his full costs or not. That depends upon § 116 of the County Courts Act, 1888. (After quoting the section and remarking that it compels the Court to decide whether the action was founded on contract or on tort, he proceeds :) We no longer have to consider forms of actions, but we are compelled by the Legislature to put every action which can be brought in the County Court, but is brought in the High Court into one or the other of these two categories. Every one who has studied the English law will know perfectly well there is debatable ground between torts and contracts. There are what are called *quasi* contracts and *quasi* torts : and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often you put it either way ; but here we are compelled to draw the line hard and fast and put every one of

the actions in one class or the other. I have looked into the authorities, but it is only necessary, as I propose to do, to refer to those cases which bear upon the true construction of this Act of Parliament. I do not think anything would be gained now by going into the old learning about the forms of actions. (After referring to *Bryant v. Herbert*, 3 C. P. D. 389; *Pontifex v. Midland Ry.*, 3 Q. B. D. 23, and *Fleming v. M. S. & L. Ry.*, 4 Q. B. D. 81, he continues :) Having studied these cases with care, it appears to me, that this is an action founded on tort. That which caused the injury was not an act of omission, it was not a mere misfeasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All he would have to prove would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case. I do not think it would be possible, without running contrary to the reasoning of the Court of Appeal in *Bryant v. Herbert*, which reversed the decision of Mr. Justice Denman and myself in the same case to hold that, within the meaning of the County Courts Act, this is an action founded on contract as distinguished from tort. . . .

CHAPTER II.

*PRINCIPLES OF LIABILITY.*TAYLOR v. L. S. & M. S. R. Co.¹

(45 Mich. 74. — 1881.)

ERROR to Superior Court of Detroit.

Griffin and Dickinson and Henry M. Campbell for plaintiff in error.*Ashley Pond* for defendant in error.

COOLEY, J. The plaintiff sues the railroad company to recover compensation for injury suffered by her in consequence of slipping and falling upon ice which had formed on a sidewalk in front of premises occupied by the defendant in the city of Monroe, and which the defendant had failed to remove as required by law. It is not claimed that any such action would lie at the common law, and the right of recovery is supposed to arise from certain State and municipal legislation.

The State legislation in question is the general act for the incorporation of cities, passed in 1873, under which the city of Monroe is now organized. Chapter 12 of this act relates to the sidewalks. Section 1 gives the city council control of all

¹ Followed in *Cook v. Johnson*, 58 Mich. 437; *State v. Donohue*, 49 N. J. L. 548; *Betz v. Limongi*, 15 So. 385, 46 La. Ann. In *Salisbury v. Kerchenroder*, 106 Mass. 458, defendant was held liable for damages to plaintiff's building by a sign hurled against it by an extraordinary gale, the sign being suspended with due care but in violation of an ordinance which subjected defendant to a penalty. Whether the imposition of a penalty, precludes a suit in tort for damages, depends upon the construction of the statute or ordinance. Compare *Grant v. Slater Co.*, 14 R. I. 380, with *Pauley v. S. G. Co.*, 131 N. Y. 90.

sidewalks, with power to construct and maintain the same and charge the expense thereof upon the lots and premises adjacent to and abutting upon such walks. Section 2 empowers the council to require the owners and occupants of adjacent lots to construct and maintain sidewalks, and section 3 is as follows: "The council shall also have power to cause and require the owners and occupants of any lot or premises to remove all snow and ice from the sidewalks in front of or adjacent to such lot or premises and to keep the same free from obstructions, encroachments, filth and other nuisances."

Section 4 provides that if any owner or occupant shall fail to perform any duty required by the council in respect to sidewalks, the council may cause the same to be performed, and levy a special assessment to meet the expenses on the lot or premises adjacent to and abutting on the sidewalk.

Section 6 is as follows: "If any owner, occupant or person in charge of any lot or premises, shall neglect to repair any sidewalk in front of or adjacent to such premises, or to remove any snow or ice therefrom, or to keep the same free from obstructions and encumbrances, in accordance with the requirements of the ordinances and regulations of the council, he shall be liable to the city for the amount of all damages which shall be recovered against the city for any accident or injury occurring by reason of such neglect." (Gen. Laws, 1873, pp. 244, 325, 326.)

Acting under the authority conferred by this act, the city council adopted an ordinance whereby it was provided that the owner or occupant of any house or building, or person entitled to the possession of any vacant lot, or person in charge of any church, or other public building, or any street, alley or public space, shall not permit the sidewalk and gutter adjoining the same to be obstructed by snow, ice, filth, dirt or other encumbrance, and when ice is formed on any sidewalk and gutter, such owners, occupants or persons having charge, or entitled to possession of property adjoining, as above provided, shall within twenty-four hours after the same has formed remove the same or cause sand, sawdust or ashes to be strewn thereon.

The defendant, it is alleged, failed to remove within twenty-

four hours, as required by this ordinance, the ice which had formed on the sidewalk in front of its premises, and the plaintiff sustained a severe injury by slipping and falling thereon.

It is said on behalf of the plaintiff that the obligation to keep the sidewalks free from snow and ice is imposed, as a duty to all persons who may have occasion to use the walks in passing and repassing, and that the neglect to do so, in consequence of which any one lawfully using the walk is injured, is a neglect of duty to him, and entitles him on well-recognized principles to maintain an action. (*Crouch v. Steele*, 3 Ex. R. 402; *Aldrich v. Howard*, 7 R. I. 214.)

To maintain this proposition it is necessary to make it appear that the duty imposed was a duty to individuals rather than a duty to the whole public of the city; for if it was only a public duty it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages. Nevertheless the burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution if a breach of the duty causes individual injury. (*Atkinson v. Water Works Co.*, 6 Exch. 404.)

The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit. In this case the duty was to keep the sidewalks free from obstructions. It will not be claimed that this was not a duty to the whole public of the city, and the disputed question is whether it is also a duty to each individual making use of the walks. An obstruction by snow or ice may make the use of a walk dangerous, or may wholly preclude its use for the purpose for which walks are constructed. If the duty to keep the walk free from obstructions is a duty to individual travellers desiring to use it, it is as much broken when the walk is wholly obstructed as when it is capable of

use but is dangerous, and an action will as much lie by one who is compelled to go around an obstruction, as by one who slips and falls in a dangerous place. Moreover, as the lot owner is required to keep the walk free from all nuisances, an individual traveller who can maintain the proposition that this is a duty to him must be entitled to bring suit wherever the existence of a nuisance diminishes either the comfort or the safety of the use of the walk by him. This view of the obligation of the lot owner would add greatly to his common-law liabilities, and it is not easy to draw the lines which should definitely limit and confine his liabilities.

But if we look a little further into the statute under which the city is incorporated, we shall see that all its provisions respecting sidewalks, so far as they impose duties upon the owners of adjoining or abutting lots, have one common object, to provide suitable and safe passage-ways for foot passengers by the side of the public streets, and to keep these in condition for safe use. The expense of such ways is imposed on the owners of adjacent lots, and these owners must keep them free from encroachments. Will it be claimed that if the city council shall require a lot owner to construct a sidewalk in front of his premises, and he should fail to obey the requirement, every person who should come upon the street desiring to pass on foot where the walk should be, and who shall be precluded from doing so by the walk not being constructed, may bring suit against the lot owner for the neglect to build it as a neglect of duty to the traveller himself? He is damnified in that case as clearly as when he falls upon a dangerous walk and is hurt; though the damage may perhaps be insignificant.

But it is clear, we think, that the duty to build the walk is only a public duty, and the duty to keep it in condition for use is also a public duty. Exactly what force is to be given to the provision of statute that the lot owner shall be liable to the city for all damages which the city may be compelled to pay for his default, we need not consider in this suit. It is enough to say here that an action grounded on that particular provision of the statute could only arise after the city had been rendered liable in a suit against it. If the statute contemplated public duties only, the city ordinance could not go further and give

individual rights of action. But neither, we think, has it attempted to do.

The judgment of the Circuit Court must stand affirmed, with costs.

The other justices concurred.

BREACH OF STATUTORY DUTY.

PARKER v. BARNARD AND OTHERS.

(135 Mass. 116. — 1893.)

TORT, against the owners and occupants of a building in Boston, for personal injuries sustained by the plaintiff therein. Trial, in this court, without a jury, before Field, J., who found for the defendants, and reported the case for the consideration of the full court. The facts appear in the opinion.

F. Peabody, Jr. (*C. A. Prince* with him), for the plaintiff.

A. T. Sinclair for one of the defendants.

A. Russ (*G. A. A. Pevey* and *H. H. Sprague* with him) for the other defendants.

DEVENS, J. The plaintiff was a police officer of the city of Boston, acting under a rule regularly passed by the police commissioners, which made it his duty to examine in the night-time the doors and windows of dwellings and stores, to see that they were properly secured, and to give notice to the inmates, or, if such buildings were unoccupied, to make fast the doors and windows found open. He crossed the threshold of the elevator entrance of the building, of which the defendants were owners or occupants, the doors of which were open, for the purpose of making an examination, thinking it was the entrance to the upper stories, in order that he might be in from the air and there light his candle, and was precipitated down the well of the elevator, which was unguarded, receiv-

ing injury thereby. It is found by the report that he entered with the honest belief "that there might be something wrong being done in the building, and with the honest purpose of arresting offenders, if he found any, or of securing the doors for the safety of the property of the occupants."

"It is a very ancient rule of the common law," says Chief Justice Gray, "that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire or other like danger, is not a trespass." (*Proctor v. Adams*, 113 Mass. 376.) As individuals may thus enter upon the land of another, firemen may do so for the protection of property, officers of the law for similar purposes, and, under proper circumstances, for the arrest of offenders or the execution of criminal process. The right to do this may be in limitation of the more general right of property which the owner has, but it is for his protection and that of the public. (*Metallic Compression Casting Co. v. Fitchburg Railroad*, 109 Mass. 277, 280; *Hyde Park v. Gay*, 120 Mass. 589, 593; *Commonwealth v. Tobin*, 108 Mass. 426; *Commonwealth v. Reynolds*, 120 Mass. 190; *Barnard v. Bartlett*, 10 Cush. 501.)

When doors are left open in the night-time under such circumstances that property is unprotected, it is a reasonable police regulation which permits an officer to enter in order to warn the inmates of the house, or to close and fasten the doors, and a license so to do is fairly implied, which, at least, should shield him from being treated as a trespasser.

But, if the plaintiff was a licensee, it is contended that he was no more than this; that, if lawfully upon the premises, he was there at his own risk; and that none of the defendants were under any obligations toward him to keep this entrance of the building in a safe condition. It is certainly well settled that by the common law, no duty is imposed on the owner or occupant of premises to keep them in a suitable condition for those who come upon them solely for their own convenience or pleasure, and who have not been either expressly invited to enter, or induced to come by the purpose for which the premises are appropriated, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they

might safely and properly enter thereon. Where no such preparation is made, or express or implied invitation extended, and the entry of the licensee is permissive only, there can ordinarily be no recovery for a neglect properly to guard the premises by which such person may be injured. (*Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, 373; *Severy v. Nickerson*, 120 Mass. 306.)

If this be conceded, it is still to be determined in the case at bar whether, when there is evidence which tends to show that the injury proceeded from the neglect of an obligation imposed upon the defendants by statute, the protection intended to be afforded by means of such a statute is not for the benefit of all those who are upon the premises in the performance of lawful duties, even if they are but licensees, as well as for the benefit of those who are there by inducement or invitation, express or implied, and thus whether such neglect may not be made the foundation of an action.

The St. of 1872, c. 260, is entitled "An act in addition to an act to provide for the regulation and inspection of buildings, the more effectual prevention of fire, and the better preservation of life and property in Boston." Section 5 is as follows: "In any store or building in Boston, in which there shall exist or be placed any hoistway, elevator or well-hole, the openings thereof through and upon each floor of the said building shall be provided with and protected by a good and substantial railing, and such good and sufficient trap-doors with which to close the same, as may be directed and approved by the inspector of buildings; and such trap-doors shall be kept closed at all times except when in actual use by the occupant or occupants of the building having the use and control of the same. For any neglect or violation of the provisions of this section, a penalty not exceeding one hundred dollars for each and every offence may be imposed upon the owner, lessee or occupant of said building."

The owner or occupant of land or a building is not liable, at common law, for obstructions, pitfalls or other dangers there existing, as, in the absence of any inducement or invitation to others to enter, he may use his property as he pleases. But he holds his property "subject to such reasonable control and

regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the Commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare." (*Blair v. Forehand*, 100 Mass. 136.) When, therefore, in the construction or management of a building, the legislature sees fit to direct by statute that certain precautions shall be taken, or certain guards against danger provided, his unrestricted use of his property is rightfully controlled, and those who enter in the performance of a lawful duty, and are injured by the neglect of the party responsible, have just ground of action against him. Were the case at bar that of a fireman, who, for the purpose of saving the property in the store, or for the prevention of the spread of the fire to other buildings, lawfully entered in the performance of his duties, and who was injured because there were no railing and trap-doors guarding the elevator well, he would have just ground of complaint that the protection which the statute has made it the duty of the owners or occupants to provide had not been afforded him. The act is not to be limited in its operation to the protection of firemen. "There is no rule," says Mr. Justice Morton, "better settled, than that the title of an act does not constitute a part of the act." (*Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 455.) But, if the title were of importance, the object of the act is asserted to be "the better preservation of life and property," as well as "the more effectual prevention of fire." The case of an officer, who, with lawful process to justify it, enters to make an arrest, or that of one who enters lawfully to protect property, does not differ in principle from that of the fireman which we have considered. Like him, they are within the building in lawful performance of their duty. Even if they must encounter the danger arising from neglect of such precautions against obstructions and pitfalls as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building.

The fact that there was a penalty imposed by the statute for neglect of duty in regard to the railing and protection of

the elevator well does not exonerate those responsible therefor from such liability. The case of *Kirby v. Boylston Market*, 14 Gray, 249, cited by one of the defendants, does not decide otherwise. It holds only that an ordinance of the city of Boston, requiring abutters, under a penalty, to clear their sidewalks from snow and ice, still left the remedy, under the St. of 1850, c. 5, § 1, for all damages sustained by an accumulation of snow and ice, exclusively against the inhabitants of the city in their corporate capacity.

As a general rule, where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty. (*Kidder v. Dunstable*, 11 Gray, 342; *Salisbury v. Herchenroder*, 106 Mass. 458; *Hyde Park v. Gay*, *ubi supra*.)

We have not considered the respective duties of the owners and of the occupants of the building as to the protection of the elevator well. Upon this inquiry, the case is not before us, and the facts are not reported.

New trial ordered.

HAYES v. MICH. C. R. Co.

(111 U. S. 228. — 1884.)

THIS action was brought by the plaintiff in error to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in error. After the evidence in the cause had been closed, the court directed the jury to return a verdict for the defendant. A bill of exceptions to that ruling embodied all the circumstances material to the case, and presented the question upon this writ of error, whether there was sufficient evidence to entitle the plaintiff below to have the issues submitted to the determination of the jury.


The defendant in running its trains into Chicago, used the tracks of the Illinois Central Railroad Company, under an arrangement between them; and no question was made but

that the defendant is to be treated, for the purposes of this case, as the owner as well as occupier of the tracks.

The tracks in question were situated for a considerable distance in Chicago, including the place where the injury complained of was received, on the lake shore. They were built in fact, at first, in the water on piles ; a breakwater, constructed in the lake, protecting them from winds and waves, and on the west or land side, the space being filled in with earth, a width of about 280 feet, to Michigan avenue, running parallel with the railroad. This space between Michigan avenue and the railroad tracks was public ground, called Lake Park, on the south end of which was Park row, a street perpendicular to Michigan avenue, and leading to and across the railroad tracks, to the water's edge. Numerous streets, from Twelfth street north to Randolph street, intersected Michigan avenue at right angles, about 400 feet apart, and opened upon the park, but did not cross it. Nothing divided Michigan avenue from the park, and the two together formed one open space to the railroad.

The right of way for these tracks was granted to the company by the city of Chicago, over public grounds, by an ordinance of the common council, dated June 14, 1852, the 6th section of which was as follows :

“Sec. 6. The said company shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences or other sufficient works as will prevent animals from straying upon or obstructing its tracks and secure persons and property from danger, said structure to be of suitable materials and sightly appearance, and of such height as the common council may direct, and no change therein shall be made except by mutual consent ; provided, however, that the company shall construct such suitable gates at proper places, at the ends of the streets which are now or may hereafter be laid out, as may be required by the common council to afford safe access to the lake ; and provided, also, that in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them.”



It was also provided in the ordinance, that it should be accepted by the railroad company within ninety days from its passage, and that thereupon a contract under seal should be formally executed on both parts, embodying the provisions of the ordinance and stipulating that the permission, rights and privileges thereby conferred upon the company should depend upon their performance of its requirements. This contract was duly executed and delivered March 28, 1853.

The work of filling in the open space between the railroad tracks and the natural shore line was done gradually, more rapidly after the great fire of October 9, 1871, when the space was used for the deposit of the débris and ruins of buildings, and the work was completed substantially in the winter of 1877-8.

In the meantime several railroad tracks had been constructed by the railroad company on its right of way, used by itself and four other companies for five years prior to the time of the injury complained of, and trains and locomotives were passing very frequently, almost constantly.

The railroad company had also partially filled with stones and earth the space east of its tracks, to the breakwater, sufficiently so in some places to enable people to get out to it. This they were accustomed to do, for the purpose of fishing and other amusements, crossing the tracks for that purpose. At one point there was a roadway across the park and the tracks, used by wagons for hauling materials for filling up the space, and a flagman was stationed there. At this point great numbers of people crossed to the breakwater; from two streets, the public were also accustomed to cross over the tracks from the parks to the ferry boats.

From Park row, at the south end of the park, running north a short distance, the railroad company, in 1872, had erected on the west line of its right of way a five-board fence, the north end of which at the time of the injury to the plaintiff was broken down. The rest of it was in good order.

The park was public ground, free to all, and frequented by children and others as a place of resort for recreation, especially on Sundays. Not far from the south end, and about opposite the end of the fence, was a band-house for free open-air concerts.

The plaintiff was a boy between eight and nine years of age, bright and well-grown, but deaf and dumb. His parents were laboring people, living, at the time of the accident, about four blocks west of Lake Park. Across the street from where they lived was a vacant lot where children in the neighborhood frequently played. On Sunday afternoon, March 17, 1878, St. Patrick's Day, the plaintiff, in charge of a brother about two years older, went to this vacant lot, with the permission of his father, to play; while playing there, a procession celebrating the day passed by, and the plaintiff, with other boys, but without the observation of his brother, followed the procession to Michigan avenue at Twelfth street, just south of Lake Park; he and his companions then returned north to the park, in which they stopped to play; a witness, going north along and on the west side of the tracks, when at a point a considerable distance north of the end of the broken fence, saw a freight train of the defendant coming north; turning round toward it he saw the plaintiff on the track south of him, but north of the end of the fence; he also saw a colored boy on the ladder on the side of one of the cars of the train motioning as if he wanted the plaintiff to come along; the plaintiff started to run north beside the train, and as he did so, turned and fell, one or more wheels of the car passing over his arm. There were four tracks at this point, and the train was on the third track from the park. The plaintiff had his hands reached out towards the car, as he ran, as if he was reaching after it, and seemed to the witness to be drawn around by the draft of the train, and fall on his back. Amputation of the left arm at the shoulder was rendered necessary, and constituted the injury for which damages were claimed in this suit.

After the evidence in the case had been closed, the court instructed the jury to find a verdict for the defendant, to which ruling the plaintiff excepted. Judgment was entered on the verdict and the plaintiff sued out this writ of error.

Mr. A. D. Rich, Mr. George C. Fry and Mr. J. W. Merriam for plaintiff in error submitted on their brief.

Mr. Ashley Pond for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. He stated the facts in the foregoing language and continued :

* * * *

The particular negligence charged in the declaration and relied on in argument, is the omission of the railroad company to build a fence on the west line of its right of way, dividing it from Lake Park ; a duty, it is alleged, imposed upon it by the ordinance of June 14, 1852, a breach of which resulting in his injury, confers on the plaintiff a right of action for damages.

It is not claimed on the part of the plaintiff in error that the railroad company was under an obligation, at common law, to fence its tracks generally, but that, at common law, the question is always whether, under the circumstances of the particular case, the railroad has been constructed or operated with such reasonable precautions for the safety of others, not in fault, as is required by the maxim *sic utere tuo ut non alienum lædas* ; that, consequently, in circumstances where the public safety requires such a precaution as a fence, to prevent danger from the ordinary operations of the railroad, to strangers not themselves in fault, the omission of it is negligence ; and that it is a question of fact for a jury, whether the circumstances exist which create such a duty.

This principle has been recognized and applied in cases of collisions at crossings of railroads and public highways, when injuries have occurred to persons necessarily passing upon and across railroad tracks in the use of an ordinary highway. "These cases," said the Supreme Court of Massachusetts in *Eaton v. Fitchburg Railroad Company*, 129 Mass. 364, "all rest on the common-law rule that when there are different public easements to be enjoyed by two parties at the same time and in the same place, each must use his privilege with due care, so as not to injure the other. The rule applies to grade crossings, because the traveller and the railroad each has common rights in the highway at these points. The fact that the legislature has seen fit, for the additional safety of travellers, imperatively to require the corporation to give certain warnings at such crossings, does not relieve it from the duty of doing whatever else may be reasonably necessary." It was accord-

ingly held in that case, that the jury might properly consider, whether, under all circumstances, the defendant was guilty of negligence in not having a gate or a flagman at the crossing, although not expressly required to do so by any statute or public authority invested with discretionary powers to establish such regulations.

And the same principle has been applied in other cases than those of the actual coincidence, at crossings of public highways. In *Barnes v. Ward*, 9 C. B. 392, it was decided, after much consideration, that the proprietor and occupier of land making an excavation on his own land, but adjoining a public highway, rendering the way unsafe to those who used it with ordinary care, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road, and liable to an action for damages to one injured by reason thereof; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway. This doctrine has always since been recognized in England. (*Hardcastle v. South Yorkshire Ry. Co.*, 4 Hurl. & Nor. 67; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Binks v. South Yorkshire Ry. Co.*, 3 B. & S. 244.)

It has also been generally adopted in this country (*Norwich v. Breed*, 30 Conn. 535; *Beck v. Carter*, 68 N. Y. 283; *Homan v. Stanley*, 66 Penn. St. 464; *B. & O. R. R. Co. v. Boteler*, 38 Md. 568; *Stratton v. Staples*, 59 Me. 94; *Young v. Harvey*, 16 Ind. 314; *Coggswell v. Inhabitants of Lexington*, 4 Cush. 307); although *Howland v. Vincent*, 10 Metc. 371, is an exception.

The enforcement of this rule in regard to excavations made by proprietors of lots adjacent to streets and public grounds in cities and towns, in the prosecution of building enterprises, and in the construction of permanent area for cellar ways, is universally recognized as an obvious and salutary exercise of the common police powers of municipal government; and the omission to provide barriers and signals, prescribed by ordinance in such cases for the safety of individuals in the use of thoroughfares, is a failure of duty, charged with all the conse-

quences of negligence, including that of liability for personal injuries of which it is the responsible cause. The true test is, as said by Hoar, J., in *Alger v. City of Lowell*, 3 Allen, 402, "not whether the dangerous place is outside of the way, or whether some small slip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveller, using ordinary care in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient."

As the ground of liability in these cases is that of a public nuisance, causing special injury, the rule, of course, does not apply where the structure complained of on the defendant's property, and the mode of its use, are authorized by law; and consequently, what has been said is not supposed to bear directly and strictly on the question in the present case, but rather as inducement, showing the ground of legislative authority implied in the ordinance, the breach of which is imputed to the defendant as negligence towards the plaintiff, and as serving to interpret the meaning and application of its provisions.

The ordinance cannot, we think, be treated as a mere contract between the city, as proprietor of the land over which the right of way is granted, and the railroad company, to which no one else is privy, and under which no third person can derive immediately any private right, prescribing conditions of the grant, to be enforced only by the city itself. Although it takes the form of a contract, provides for its acceptance and contemplates a written agreement in execution of it, it is also and primarily a municipal regulation, and as such, being duly authorized by the legislative power of the State, has the force of law within the limits of the city. (*Mason v. Shawneetown*, 77 Ill. 533.)

Neither can the ordinance be limited by construction to the mere purpose of preventing animals from straying upon or obstructing the railroad tracks; because, in addition to that, it expressly declares that the walls, fences or other works required shall be suitable and sufficient to secure persons and property from danger. This cannot refer to persons and

property in course of transportation and already in care of the railroad company as common carrier, for the duty to carry and deliver them safely was already and otherwise provided for by law; nor, can it be supposed, from the nature of the case, that the stipulation was intended as security for any corporate interest of the city. The proviso in the 6th section, that the company shall construct such suitable gates at crossings as thereafter might be required by the common council to afford safe access to the lake, clearly designates the inhabitants of the city as at least within the scope of this foresight and care, the safety of whose persons and property was in contemplation.

The prevention of animals from straying upon the tracks, and the security of persons and property from danger, are two distinct objects, for both which the requirement is made of suitable walls, fences or other protections; and the ordinance in these two particulars, is to be referred to distinct legislative grants of power to the municipal body. The general act to provide for the incorporation of cities and villages which constitutes the charter of the city of Chicago, confers upon its city council power: "Twenty-sixth. To require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle guards, crossings of streets, and public roads, and keep the same in repair, within the limits of the corporation. In case any railroad company shall fail to comply with any such ordinance, it shall be liable for all damages the owner of any cattle or horses or other domestic animal may sustain, by reason of injuries thereto while on the track of such railroad, in like manner and extent as under the general laws of this State, relative to the fencing of railroads." (Cothran's Rev. Stat. Ill. 1884, 227.) By the general law of the State, requiring railroads to be fenced, except within the limits of municipal corporations, the company omitting performance of the duty is liable to the owner for all damages to animals, irrespective of the question of negligence. (Cothran's Rev. Stat. Ill. 1884, 1151.)

Whether this provision is limited to the protection of animals, and covers only the case of damage done to them, or whether a failure to comply with the ordinance authorized

thereby might be considered as evidence of negligence, in case of injury to person or property, in any other case, it is not necessary for us now to decide; for in the same section of the statute there is this additional power conferred upon the city council: "Twenty-seventh. To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads," etc.

The latter clause of this provision is general and unrestricted. It confers plenary power over railroads within the corporate limits, in order that by such requirements as in its discretion it may prescribe, and as are within the just limits of police regulation, the municipal authority may provide protection against injury to persons and property likely to arise from the use of railroads. And as we have shown by reference to analogous cases, the erection of a barrier between the railroad tracks and the public highways and grounds, particularly such a resort as the Lake Park is shown to be, in the present case, is a reasonable provision, clearly within the limits of such authority. To leave the space between the park and the breakwater, traversed by the numerous tracks of the railroad company, open and free, under the circumstances in proof, was a constant invitation to crowds of men, women and children frequenting the park to push across the tracks at all points to the breakwater, for recreation and amusement, at the risk of being run down by constantly passing trains. A fence upon the line between them might have served, at least, as notice and signal of danger, if not as an obstacle and prevention. For young children, for whose health and recreation the park is presumably in part intended, and as irresponsible in many cases as the dumb cattle, for whom a fence is admitted to be some protection, such an impediment to straying might prove of value and importance. The object to be attained — the security of the persons of the people of the city — was, we think, clearly within the design of the statute and the ordinance; and the means required by the latter to be adopted by the railroad company was appropriate and legitimate. (*Mayor, etc., of New York v. Williams*, 15 N. Y. 502.)

It is said, however, that it does not follow that whenever a

statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of *Atkinson v. Newcastle Water Works Co.*, L. R. 2 Exch. Div. 441, as authority for that proposition, qualifying as it does the broad doctrine stated by Lord Campbell in *Couch v. Steel*, 3 E. & B. 402. But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited, that whether such an action can be maintained must depend on the "purview of the legislature in the particular statute, and the language which they have there employed," we think the right to sue, under the circumstances of the present case, clearly within its limits. In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. "The nature of the duty," said Judge Cooley in *Taylor v. L. S. & M. S. R. Company*, 45 Mich. 74, "and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit." (See, also, *Railroad Company v. Terhune*, 50 Ill. 151; *Schmidt v. The Milwaukee & St. Paul Railway Company*, 23 Wisc. 186; *Siemers v. Eisen*, 54 Cal. 418; *Galena & Chicago Union Railroad Company v. Loomis*, 13 Ill. 548; *O. & M. Railroad Company v. McClelland*, 25 Ill. 140; *St. L. V. & T. H. Railroad Company v. Dunn*, 78 Ill. 197; *Massoth v. Delaware & Hudson Canal Company*, 64 N. Y. 521; *B. & O. Railroad Company v. State*, 29 Md. 252; *Pollock v. Eastern Railroad Company*, 124 Mass. 158; Cooley on Torts, 657.)

It is said, however, that, in the present case, the failure or omission to construct a fence or wall cannot be alleged as negligence against the company, because, as the structure was to be, as described in the ordinance, of suitable materials and slightly appearance, and of such height as the common council might direct, no duty could arise until after the council had directed the character of the work to be constructed, of which no proof was offered. But the obligation of the company was not conditioned on any previous directions to be given by the city council. It was absolute, to build a suitable wall, fence or other sufficient work as would prevent animals from straying upon the tracks and secure persons and property from danger. The right of the council was to give specific directions if it saw proper, and to supervise the work when done, if necessary; but it was matter of discretion, and they were not required to act in the first instance, nor at all, if they were satisfied with the work as executed by the railroad company. (*Tallman v. Syracuse, Binghamton & N. Y. Railroad Company*, 4 Keyes, 128; *Brooklyn v. Brooklyn City Railroad Company*, 47 N. Y. 475.)

It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection.

The question is, was it *causa sine qua non*, a cause which if it had not existed, the injury would not have taken place, an occasional cause? and that is a question of fact, unless the causal connection is evidently not proximate. (*Milwaukee & St. Paul Railroad Company v. Kellogg*, 94 U. S. 469.) The rule laid down by Willes, J., in *Daniel v. Metropolitan Railway Company*, L. R. 3 C. P. 216, 222, and approved by the Exchequer Chamber, L. R. 3 C. P. 591, and by the House of Lords, L. R. 5 H. L. 45, was this: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to;" and in the case of *Williams v. Great Western Railway Company*,

L. R. 9 Excheq. 157, where the rule was applied to a case similar to the present, it was said (p. 162): "There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required, is to warn people of what is before them and to make them pause before reaching a dangerous place like a railroad."

The evidence of the circumstances showing negligence on the part of the defendant, which may have been the legal cause of the injury to the plaintiff, according to the rule established in *Railroad Company v. Stout*, 17 Wall. 657, and *Randall v. B. & O. Railroad Company*, 109 U. S. 478, should have been submitted to the jury; and for the error of the Circuit Court in directing a verdict for the defendant,

*The judgment is reversed and a new trial awarded.*¹

ASSUMPTION OF SKILL.

BISHOP v. WEBER.

(139 Mass. 411. — 1885.)

TORT. Writ dated October 29, 1883. The declaration as originally filed contained two counts. On May 19, 1884, a demurrer to the declaration was sustained, and no exception or appeal was taken. At the same term, the declaration was amended by adding a third count, and by inserting certain words in the first and second count. The plaintiff had also leave to amend her writ by adding after the word "tort" the words "or contract, the plaintiff being doubtful to which class of actions this action belongs."

The Superior Court sustained the demurrer and ordered judgment for the defendant; and the plaintiff appealed to this court.

¹ *Milnes v. Mayor, etc.*, Huddersfield, 11 App. Cas. 511; *Knight v. N. Y. L. E. & W. Ry. Co.*, 99 N. Y. 25.

J. D. Bryant for the defendant.

B. C. Moulton for the plaintiff.

C. ALLEN, J. If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such, by those who arrange for an entertainment, to furnish food and drink for all who may attend it, and if he undertakes to perform the service accordingly, he stands in such a relation of duty towards a person who lawfully attends the entertainment, and partakes of the food furnished by him, as to be liable to an action of tort for negligence in furnishing unwholesome food, whereby such person is injured. This liability does not rest so much upon an implied contract, as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter may have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties. (*Norton v. Sewall*, 106 Mass. 143; *Longmeid v. Holliday*, 6 Exch. 761; *Pippin v. Sheppard*, 11 Price, 400.)

The plaintiff's action was originally entitled "in an action of tort." The plaintiff obtained leave to amend by adding the words "or contract, the plaintiff being doubtful to which class of actions this action belongs." This amendment was unnecessary, and may be disregarded, all the amended counts upon which the plaintiff relies being in tort. It is not necessary to sustain the demurrer on account of this lack of literal precision in entitling the action.

The defendant relies on several other extremely fine points of objection, but, without dwelling on them in detail, it may be said, in general terms, that the several counts sufficiently

set forth the facts from which the duty of the defendant towards the plaintiff sprung, and it is not necessary to state formally and in terms that the defendant occupied such a relation towards the plaintiff that the law cast upon him the duty ; they also sufficiently aver that the defendant neglected that duty, and that the plaintiff was injured by reason thereof. It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appears that he ought to have known of it, and was negligent in furnishing unwholesome food, by reason whereof the plaintiff was injured.

Judgment reversed.

PROXIMATE CAUSE.

MILWAUKEE & C. Ry. Co. v. KELLOGG.

(94 U. S. 469. — 1876.)

ERROR to the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

Mr. John W. Cary for the plaintiff in error.

Mr. Myron H. Beach contra.

MR. JUSTICE STRONG delivered the opinion of the court.

This was an action to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the State of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears that the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill

and lumber piles, whilst an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial, it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. It was also admitted that there was conflict between the parties plaintiff and defendant respecting the ownership of the land where the mill stood and the lumber was piled, both claiming under a common source of title. The plaintiff had built the mill, and he was in occupation of it, believing he had a right to be there."

* * * * *

A second exception taken in the court below and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to another, and to fixing rates of insurance, that, owing to the distance between the elevator and the mill, and the distance between the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon, or in measuring the hazard of mill or lumber.

This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge. Thus, it has been held that an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off (*Keller v. Railroad Company*, 2 Abb. (N. Y.) App. Dec. 480); or whether it was prudent to blow a whistle at a particular time (*Hill v. Railroad Company*, 55 Me. 438). Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire. (*Muloy*

v. *Insurance Company*, 2 Gray (Mass.) 541.) In *Durell v. Bed-erly*, Chief Justice Gibbs said, "The opinion of the underwriters on the materiality of facts, and the effect they would have had upon the premium, is not admissible in evidence." Powell's Evid. (4th ed.) 103. And in *Campbell v. Richards*, 5 Barn. & Ad. 846, Lord Denman said: "Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than in another." See also Lord Mansfield's opinion in *Carter v. Boehm*, 3 Burr. 1905, 1913, 1914, and *Norman v. Higgins*, 107 Mass. 494, in which it was ruled, that, in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witnesses would have spread to the plaintiff's land, was inadmissible.

The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in

this case; and in its support the two cases of *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 210, and *Kerr v. Pennsylvania Railroad Co.*, 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. (*Webb v. The Rome, Watertown & Ogdensburg Railroad Co.*, 49 N. Y. 420, and *Pennsylvania Railroad Co. v. Hope*, 80 Penn. St. 373.) And certainly they are in conflict with numerous other decided cases. (*Kellogg v. The Chicago & North Western Railroad Co.*, 26 Wis. 224; *Perley v. The Eastern Railroad Co.*, 98 Mass. 414; *Higgins v. Dewey*, 107 id. 494; *Fent v. The Toledo, Peoria & Warsaw Railroad Co.*, 59 Ill. 349.)

The true rule is, that what is the proximate cause of an injury is ordinarily a question for a jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. (2 Bl. Rep. 892.) The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act,

and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the

nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is in the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.¹

Judgment affirmed.

BOSCH v. THE B. & M. RY. CO.

(44 Iowa, 402. — 1876.)

PLAINTIFFS alleged that they were the owners of certain lots in the city of Burlington upon which they had erected

¹ *Ryan v. N. Y. C. Ry. Co.*, *supra*, has been criticised or distinguished frequently; *e.g.* *Fent v. Toledo &c. Ry. Co.*, 59 Ill. 349; 14 Am. R. 19; *Clemens v. Hannibal &c. Ry. Co.*, 53 Mo. 366; 14 Am. R. 460; *D., L. & W. Ry. Co. v. Salmon*, 10 Vroom, 299; 23 Am. R. 214; *Billman v. Terre Haute, I. &c. Ry. Co.*, 96 Ind. 346; *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158. It is followed in *Read v. Nichols*, 118 N. Y. 224, a doubtful case.

One whose negligence has inflicted an injury which must prove fatal but for a surgical operation, is not relieved from liability because the blunder of a skilful surgeon hastens death. (*Santer v. N. Y. C. & H. R. Ry. Co.*, 66 N. Y. 50.)

valuable buildings; that a public street lay between these lots and the river and contiguous to the latter; that defendant filled up a portion of the river with deposits of earth, increasing the distance of plaintiff's property therefrom nearly 800 feet, and occupied it with tracks, yards and buildings; that by reason of this change and use of the embankment by the defendants the fire department of the city was unable to gain access to the river and to extinguish a fire that had accidentally broken out in plaintiff's building, whereby it was destroyed. Damages were claimed for the value of the buildings, amounting to over \$22,000.

Demurrer to the petition was sustained and plaintiffs appealed.

P. H. Smyth for appellants.

D. Rorer for appellee.

ROTHROCK, J. Aware as we are of the difficulty in many cases in determining whether damages claimed should be regarded as proximate or remote, yet we are united in the opinion that the court below correctly determined that no recovery can be had upon the allegations in this petition, for the reason that the damages are not the direct and proximate result of the wrongs complained of, but are too remote. In the case of *Insurance Company v. Friend*, 7 Wallace, 49, it is said: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and has been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."

We do not regard the facts of this case as an approach to the dividing line where distinctions become shadowy and discriminations difficult to be made. If any damages were recoverable for the obstruction of the streets by an improper construction of defendant's road, thus depriving plaintiffs of

convenient access to the river, they were recoverable by reason of the obstruction of the streets, and simply because the streets were obstructed, and not by reason of a fire, which could not be extinguished because the defendant occupied and used the streets for a railroad.

We have examined the cases cited by counsel for appellants, and although they are ingeniously presented, yet the facts in this case are so widely different from any of them that we cannot regard them as applicable. The nearest approach to this case is that of the *Metallic Compression Co. v. Fitchburg Railroad Company*, 109 Mass. 277. In that case the facts were that plaintiff's manufacturing establishments, situated about fifty feet from defendant's railroad track, were on fire. Two fire engines were brought on the ground, the hose was laid across the railroad track to a hydrant, and water was being thrown on the fire, which was being diminished. A freight train approached, and although warned in time, the employees of defendant negligently ran across the hose, severing it, and stopping the supply of water, and the building was burned. The defendant was held liable.

We suppose without question that if one should in any manner, by cutting the hose, disabling the engine, or the like, stop the stream of water, by reason of which act property is destroyed, he would be liable, because the damages are the direct and proximate result of his act. But in the case at bar the building of the railroad tracks and depots, the widening and filling the streets, have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery.¹

Affirmed.

¹ *Scheffer v. Ry. Co.*, 105 U. S. 249; *White v. Conly*, 14 Lea, 51; *Searle v. G. C. & S. F. Ry. Co.*, 65 Tex. 274; *Victorian Ry. Com'rs. v. Coultas*, 13 App. Cas. 222; accord. *Hill v. Kimball*, 76 Tex. 210; 13 S. W. R. 59, *contra*. Cf. *Buchanan v. West Jersey Ry. Co.*, 52 N. J. L. 265; and *Renner v. Canfield*, 36 Minn. 90; 30 N. W. 435.

Remoteness of damages was thoroughly discussed in *The Argentino*, 13 P. D. 191; *affd.*, 14 App. Cas. 519.

McDONALD v. SNELLING.

(14 Allen, 290. — 1867.)

DEFENDANT'S servant was so negligently driving in a public street as to come into collision with a carriage, and thereby caused the horse which was drawing the same to take fright and run away, and to inflict serious injuries upon plaintiff's person and property.

Defendant's demurrer to plaintiff's declaration was overruled and he appealed.

J. L. Stackpole for defendant.

J. Nickerson for plaintiff.

FOSTER, J. The question raised by this demurrer is, whether the injury received by the plaintiff was so remote from the negligent act of the defendant that the action cannot be sustained, although the plaintiff was injured without his own fault, and would not have been injured but for the fault of the defendant. How far at common law is one guilty of negligence responsible in damages for the consequences resulting from his neglect?

If the present action had been brought against a town, under circumstances similar to those disclosed in this declaration, *Marble v. Worcester*, 4 Gray, 395, would be a decisive authority in favor of the defendant. The liability for damages caused by defects in highways is limited to cases where the defect is the direct and immediate cause of the injury. (*Jenks v. Wilbraham*, 11 Gray, 142. But this statute liability is more narrowly restricted than the rule in actions at common law for damages caused by negligence, in which it is perfectly well settled that the contributory negligence of a third party is no defence, where the defendant has also been guilty of negligence without which the damage would not have been sustained. (*Eaton v. Boston & Lowell Railroad*, 11 Allen, 500.) The extent of the defendant's responsibility cannot therefore be conclusively determined by the rule of *Marble v. Worcester*, because the limits of liability under the statute as to defects

in public ways and at common law for negligence are not identical. These cases against towns can be reconciled with the general principles of the law only by the consideration that they depend exclusively on the statute provision, within the terms of which they are strictly confined.

Opinions upon questions of marine insurance are frequently quoted, to illustrate the meaning of the maxim, *causa proxima non remota spectatur*. The exigencies of the present decision do not require an elaborate examination of the doctrine in its application to the law of insurance; but a few observations may be useful. Where the immediate cause of loss is a peril insured against, the underwriters are not exonerated by the fact that its original cause was something not covered by the policy. They are liable if the loss ends in a peril insured against, although it began in some other cause. Thus, a loss arising immediately from a peril of the sea, but remotely from the negligence of the master, is protected by the policy; but it by no means follows that, in an action brought against the owner or master for such negligence, the consequent loss of the cargo could not be included in the measure of damages. (*Redman v. Wilson*, 14 M. & W. 476.) On the contrary, where a master unnecessarily deviated from his voyage, and during the deviation a cargo of lime was wet by a tempest, and the bark was thereby set on fire and consumed, the owner was held liable for the fault of his agent, the master, and the deviation was deemed to be sufficiently the proximate cause of the loss of the cargo. (*Davis v. Garrett*, 6 Bing. 716.) In a recent insurance cause, one learned judge, Willes, J., said: "The ordinary rule of assurance law is, that you are to look to the proximate and immediately operating cause, and to that only"; and another, Erle, C. J., said: "The words are to be construed with reference to the known principle pervading insurance law, *causa proxima non remota spectatur*; the loss must be connected with the supposed cause of it, and in the relation of cause and effect, speaking according to common parlance." (*Ionides v. Universal Ins. Co.*, 8 Law Times (N. S.) 705; *Marsden v. City and County Ass. Co.*, Law Rep. 1 C. P. 232.) But in an action for damages for refusing to receive a ship into a dock, the rule was said to be "that the damage must be prox-

mate (not immediate) and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ." (*Wilson v. Newport Dock Co.*, Law Rep. 1 Exch. 186.)

Perhaps the truth may be that a maxim couched in terms so general as to be necessarily somewhat indefinite has been indiscriminately applied to different classes of cases in different senses, or at least without exactness and precision; and that is the real explanation of the circumstance that *causa proxima*, in suits for damages at common law, extends to the natural and probable consequences of a breach of contract or tort; while in insurance cases and actions on our highway statute it is limited to the immediately operating cause of the loss or damage. If this be so, the frequent reference to the maxim in cases like the present is not particularly useful, and certainly not conducive either to an accurate statement of principles or to uniform and intelligible results. In insurance causes the maxim is resorted to as furnishing a rule by which to determine whether a loss is attributable to a peril against which the contract has promised indemnity, and its application charges as frequently as it exonerates the underwriter. (*Peters v. Warren Insurance Co.*, 3 Sumner, 389; *S. C.* 14 Pet. 99; *Hillier v. Alleghany County Ins. Co.*, 3 Penn. State R. 470.) The limits of liability and the definition of proximate cause in the law of insurance are too narrow and restricted to be applied to the present case.

Definitions and illustrations drawn from other branches of the law may afford instructive analogies, but for controlling authorities we are to look to adjudications in actions of a similar nature to the present, and arising upon a state of facts more closely resembling those now under consideration. Here the defendant is alleged to have been guilty of culpable negligence. And his liability depends, not upon any contract or statute obligation, but upon the duty of due care which every man owes to the community, expressed in the maxim *sic utere tuo ut alienum non laedas*.

Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the

common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion, this is the well-established and ancient doctrine of the common law, and such a liability extends to consequential injuries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote, if, according to the usual experience of mankind, the result was to be expected. This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be: first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and, secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

Two recent cases, both much considered, sound and consistent with each other, well illustrate the true rule of law. A druggist who carelessly labelled belladonna, a deadly poison, as extract of dandelion, a harmless medicine, and sent it so labelled into the market, was held, by the court of appeals in New York, liable in damages, after it had passed through several intervening hands, had been purchased of an apothecary and administered by the plaintiff to his wife, who was injured by using it as medicine in consequence of the false label. (*Thomas v. Winchester*, 2 Selden, 397.) Here the dealer owed to the public a duty not to expose human life to danger by falsely labelling a noxious drug and selling it in the market as a harmless article. To do so was culpable and actionable negligence towards all likely to be, and who were in fact, injured by the mistake. And the injury that did follow was the natural and easily foreseen result of the carelessness.

On the other hand, where an article, black oxide of manganese, in itself harmless, which became dangerous only by being combined with another, was sold by mistake, the plaintiff, who purchased it of a third party and mixed it with

another substance, the combination with which caused a dangerous explosion, was held by this court to have no right of action against the original vendor who made the mistake, for the damages caused by the explosion. (*Davidson v. Nichols*, 11 Allen, 514.) The mistake in regard to an article in its own nature ordinarily harmless, in the absence of contract or false representation, was not a violation of any public duty or negligence of such a wrongful and illegal character as to render the party who made it liable for its consequences to third persons. Nor was it a natural and probable consequence of such a mistake that this ordinarily innocuous substance would be mixed with another chemical agent, become explosive by the combination, and a third party be thereby injured.

It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.

There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any person injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community, or to all persons whom his negligence may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant.

Applying these principles more closely to the facts set forth in this declaration and admitted by the demurrer, we find that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run

violently along Tremont street round a corner, near by, into Eliot street, where he ran over plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons travelling in the vicinity. Every one can see plainly that the accident to the plaintiff was one very likely to ensue from the careless act. We are not therefore dealing with the remote or unexpected consequences, not easily foreseen or ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom.

These views are fortified by numerous decisions, to a few of which it may be expedient to refer. It was recently held by this court that when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse was liable for that damage. (*Barnes v. Chapin*, 4 Allen, 444.) We cannot distinguish between the different ways of letting a horse loose upon the street; whether by leaving him there untied, or leaving a gate open, or, as in the present case, by driving against him, and thus causing him to run away. In *Powell v. Deveney*, 3 Cush. 300, the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street, after which a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff, who was walking by, and broke her leg. For this injury she was al-

lowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. (See, also, *Powell v. Salisbury*, 2 Yo. & Jer. 391; *Vandenburg v. Truax*, 4 Denio, 464; *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chaplin*, ib. 245; *Morrison v. Davis*, 20 Penn. State R. 175; *Lynch v. Nurdin*, 1 Q. B. 29; *Thomas v. Winchester*, *ubi supra*, and cases there cited.) When a horse strayed on the highway and there viciously and violently kicked a child, the owner was held not liable in the absence of evidence that he knew the animal was in the habit of kicking; because the act was not one which it was in the ordinary course of nature for a horse of common temper and disposition to do. (*Cox v. Burbidge*, 32 Law Journ. (N. S.) C. P. 89. See also *Cook v. Waring*, ib. Exch. 262.) But two years later the same court held a defendant liable who had negligently left insecure a gate which he was bound to repair, in consequence of which his horse strayed into the field of an adjoining proprietor and there kicked another horse; because this was the natural consequence of two horses meeting under such circumstances, and such an injury produced by such an animal was deemed to be the proximate consequence of the defendant's negligence. (*Lee v. Riley*, 34 Law Journ. (N. S.) C. P. 212. See, also, *Reed v. Edwards*, ib. C. P. 31.) In a case where the defendant left on the street, exposed for sale, a machine for crushing oil cake between rollers, into the cogs of which a little child put his fingers while another boy turned the handle, and the fingers were crushed, the court held that the act was too remote; and Bramwell, B., said: "The defendant was no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them;" but the same Baron added, "further I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called wilfully mischievous? If that could not be said, then it is not negligence, for between negligence and wilful mischief there is no difference but of degree." (*Man-*

gan v. Atherton, Law Rep. 1 Exch. 239.) This case has no tendency and indicates no intention to overrule *Dixon v. Bell*, 5 M. & S. 198, in which an injury having been received from a loaded gun, Lord Ellenborough held the owner liable for leaving a dangerous instrument in a state capable of doing mischief, although the mischief was caused by a girl taking it up, pointing it at a child, and snapping the trigger after the priming had been withdrawn.

It may not always be easy to determine whether any particular act of negligence is of such a character as to render the party guilty of it liable to third persons; or whether the ensuing consequences are so far natural and probable as to impose a liability for them in damages. Cases may be put, falling very near the dividing line, and no rule can be laid down in advance, which will determine all with precision. But the difficulty of applying a principle is a poor argument against its validity, unless one more satisfactory can be proposed in its stead. There may be discrepancies and want of uniformity in the application of the principle to the facts of particular cases, but all the authorities cited concur in the support of the doctrines we have stated, and agree as to the rule by which the extent of liability for consequential damages resulting from negligence ought to be determined.

In the opinion of a majority of the court, the demurrer in the present case must be overruled, because on the statements of the declaration, the plaintiff's injury does not appear to be so remote from the negligence of the defendant as to exonerate the latter from liability. When such a question is raised by the pleadings or arises upon agreed or undisputed facts, it is matter of law; but where the evidence is contradictory, or the inferences to be drawn from it are uncertain, the jury must determine by a verdict whether the facts fall within the rule of law to be laid down on the subject. (*Wilson v. Newport Dock Co.*, *ubi supra*.)

Demurrer overruled.

BENNETT v. WHITNEY.

(94 N. Y. 302. — 1884.)

FINCH, J. The principal dispute in this case respects the true nature and legal effect of the cause of action pleaded. The complaint is for negligence in leaving unguarded and unlighted an opening temporarily made in a city street. The defendants named are the mayor, the members of the common council, and the street commissioner of Binghamton, who are sued by their individual names, with the title of their respective offices added. The word "as" does not precede their official designations. The complaint alleges that the defendant, the mayor, and the defendants who constituted the common council, held those offices respectively, that by the city charter they were made commissioners of highways, and that it became and was their duty to keep the city streets in good order and protect any excavation made therein. It then avers the defendant Whitney was street commissioner of the city and had charge of the works upon the excavation from which the plaintiff's injury arose; that the mayor and common council directed it to be made and the defendant Whitney obeyed the direction; and that the mayor and common council and "the said street commissioner William Whitney," left the opening unguarded, and so were guilty of negligence which caused the injury. The complaint closes with a demand for judgment "against the defendants." The trial judge held, at the close of the case, that the action was against the defendants as individuals, and not as officers of the city. In this, we think, he was right. Whatever may have been some earlier doubts on the subject, it is settled in this court that one who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage by a neglect properly to perform such duties. (*Hover v. Barkhoof*, 44 N. Y. 113.) Just this cause of action the complaint sets out. It alleges the assumption of official duties, and the possession of official power by the individuals named, their failure properly to perform those duties and a resultant injury to the plaintiff caused by such negligence. The omission

in the summons of the word "as" before the official titles of the defendants, indicates that they were sued as individuals, and that the addition of their names of office was but *descriptio personæ*. . . . The trial judge, however, determined to hear and decide "the whole question," and, after argument, granted a nonsuit as to the mayor and common council, but held that the action was against the defendants individually, and the question of negligence, as to the defendant Whitney must go to the jury.

What has been said as to the proper construction of the complaint sufficiently indicates the ground of our concurrence with the conclusion of the trial court in that respect. The case therefore became one of negligence by an officer in the performance of official duty. (*Robinson v. Chamberlain*, 34 N. Y. 389.) It was not a case of non-feasance or omission to act at all, where in some cases as to the repair of highways, it may be necessary to show adequate means in the hands of the officer, but a case of misfeasance where he had acted, but conducted himself negligently to the special injury of an individual. Where that negligence is willful or intentional, the city charter makes it a misdemeanor, and "in addition thereto" declares the liability for damages to the party injured; but we do not understand this provision as taking away, or in any manner destroying the right of the party injured, to sue for simple negligence, where an official act or omission of duty has resulted in his injury. We agree with the General Term that the provision referred to did not repeal the common-law rule applicable to a case not named or made the subject of legislation by the charter itself, and was not intended to affect the rule of liability declared in the cases to which reference has been made.

The judgment and order should be affirmed, with costs.

SUMMERS v. DAVIESS COUNTY.

(103 Ind. 262. — 1885.)

ELLIOTT, J. The appellant alleges in her complaint that she fell and broke her leg; that she was poor and unable to procure

a surgeon to attend her, and that James F. Parks was employed by the county to give medical and surgical attention to those who were too poor to employ physicians and surgeons. It is also averred that "James F. Parks, at the time he was so employed was not a skillful physician having a knowledge of surgery, but, on the contrary, was unskillful in the profession, and had no knowledge of surgery, and was incompetent to intelligently perform the duties of a physician and surgeon." It is further alleged that Parks was called upon to attend the appellant, and that his want of knowledge and lack of skill were such that he so unskillfully and improperly treated her as to do her great injury. If, in any case, a recovery could be had against the county for the unskillful and improper manner in which a surgeon treated an injured poor person, it is clear that there can be none in this, for it does not appear that the board of commissioners did not exercise care and diligence in the selection of the physician for the poor. Where care and diligence are used in the selection of a physician, the officers representing the county have done their duty, and where there is no breach of duty there can be no negligence. Mere errors in judgment do not constitute negligence. We put our decision on broader grounds. The commissioners are public officers, charged with the performance of public duties, and in the performance of public duties they are not mere agents. It is true that officers occupying positions similar to those held by county commissioners are often spoken of as agents, and, in some cases, it is, perhaps, proper to treat them as agents. But even when such officers are regarded as agents, a broad and important difference is noted between public and private agents, and essentially different rules govern the two classes. (*Newman v. Sylvester*, 42 Ind. 106; *Jackson v. School Tp.*, 90 Ind. 101; *Reese School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Platter v. Board, etc.*, *post*, p. 360.)

Where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim, *respondeat superior*, does not govern. This rule is illustrated in many cases. In the case of *Ogg v. City of Lansing*, 35 Iowa, 495, (14 Am. R. 499,) it was held that a city was not liable for the negligence of persons placed in charge of a smallpox hospital which the city

had established. It was said in the course of the opinion in that case, that "It is impossible to conceive of the endless complications and embarrassments which such a doctrine would involve, and of the extent to which the public interests would thereby suffer. It is safe to assume that if such were recognized as the law, no town would voluntarily assume corporate functions, and that every industrial and commercial interest would become paralyzed." The recent case of *Bryant v. City of St. Paul*, 21 Central L. Jour. 33, is directly in point. It was there held that a city was not liable for the misfeasance of members of the board of health selected by the city. Many authorities are cited in the note appended to that case, and from them it appears that the doctrine that public corporations to whose officers governmental powers are delegated, are not responsible for the negligence of the officers in the exercise of these governmental powers. This doctrine has long prevailed in this State. (*Brinkmeyer v. City of Evansville*, 29 Ind. 187; *Robinson v. City of Evansville*, 87 Ind. 334 (44 Am. R. 770); *Faulkner v. City of Aurora*, 85 Ind. 130 (44 Am. R. 1); *City of La Fayette v. Timberlake*, 88 Ind. 330.

We have many cases holding that counties, townships and cities are instrumentalities of government, and it must, therefore, be true that where they act simply as the local government they act for the State. As the State is not liable for the acts of its officers, neither can the public corporations be held liable for the acts of their officers in the exercise of political powers. (*Robinson v. Schenck*, 102 Ind. 307; *Justice v. City of Logansport*, 101 Ind. 326; *Kistner v. City of Indianapolis*, 100 Ind. 210.

There is no more reason for holding counties liable for the negligence of the commissioners in the exercise of the governmental functions delegated to them, than there is for holding cities liable for the acts of their firemen or police officers, or for holding counties and townships responsible for the torts of sheriffs and constables. In providing for the care of the poor, a police power which resides primarily in the sovereignty is exercised, and neither the sovereign nor the local governing body to whom such a power is delegated is responsible for the misfeasance of its officers.

Judgment affirmed.

HIGGINS v. McCABE.

(126 Mass. 13. — 1878.)

TORT. The declaration alleged that the defendant while employed as midwife by plaintiff's mother, pretending to be competent and skillful in treating diseases of the eyes, such as plaintiff then had, undertook the treatment of plaintiff, and so negligently and unskillfully treated the plaintiff that the plaintiff became totally blind.

COLT, J. This action proceeds upon the ground that the defendant failed to discharge a legal duty which she owed the plaintiff, resulting in the injury complained of. The question is whether the evidence relied on by the plaintiff would justify a verdict in favor of the child; and, in the opinion of a majority of the court, it would not. It appears that the defendant was originally employed only as a midwife. The parents had employed her twice before in that capacity. There was no competent evidence that the treatment of diseases of the eyes which might be developed in the child was embraced in the duties which the defendant undertook as midwife; and there is no evidence that the defendant was unskillful or negligent in the performance of any of the duties with which she was properly chargeable in that capacity.

But it is insisted that, independently of the employment as midwife, the jury upon this evidence might properly find that the defendant, professing to have superior skill and experience, held herself out as competent to cure this particular disease, and thereupon was permitted by the mother to assume the treatment of it. The evidence on which it is sought to charge the defendant with this additional duty is found in the testimony of the mother; and that testimony must be construed with reference to the character and relation of the parties, and the admitted facts in the case. The services of the defendant in respect to the cure of this disease were wholly gratuitous; they were performed as acts of benevolence only. The defendant was a midwife; the jury would not be justified in finding that she claimed to pos-

sess, or might reasonably be expected from her calling to have, the peculiar knowledge, skill, and experience of an expert in such matters. The representations of the defendant, that she could cure the child with simple remedies and washes, that she had cured other children in the same way who were similarly afflicted, and that there was no need of a doctor, were but the expression of an opinion as to the efficacy of her remedies, and did not imply that she undertook to use that higher skill of the medical profession which is required in the treatment of the more complicated and delicate organs. The question was whether she had discharged the duty which she assumed with that skill she professed to have, and with that diligence which might reasonably have been expected of her. Upon that question, the fact that the service was rendered without compensation must have an important if not decisive bearing.

It is often said, that a gratuitous agent is liable for gross negligence only; but, without regard to degrees of negligence, it is plain that the duty imposed upon such an agent is less stringent than when the service undertaken is founded upon a consideration paid.

Under the rule requiring ordinary care as applied to this case, we see no evidence of neglect in any degree. A physician must apply the skill and learning which belong to his profession; but a person who, without special qualifications, volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. To hold otherwise would be to charge responsibility in damages upon all who make mistakes in the performance of kindly offices for the sick. (*Gill v. Middleton*, 105 Mass. 477, 479; *Leighton v. Sargent*, 11 Foster, 119; *Simonds v. Henry*, 39 Maine, 155; *Lanphier v. Phipos*, 8 C. & P. 475; *Hancke v. Hooper*, 7 C. & P. 81.)

The defendant was attentive and diligent in her treatment of the child, and in the use of the remedies she proposed. There was evidence, it is true, from regular physicians, that, if other and more powerful remedies had been seasonably applied, they would probably have effected a cure; but these were remedies known to the medical profession, of which the defendant neither had nor professed to have knowledge. It was not a case where

the defendant, as in the cases cited by the plaintiff, assumed to act as a regular surgeon or a regular practitioner. (*Ruddock v. Lowe*, 4 F. & F. 519; *Jones v. Fay*, 4 F. & F. 525.)

DUBOIS *v.* DECKER.

(130 N. Y. 325. — 1891.)

HAIGHT, J. This action was brought to recover damages of the defendant, a physician and surgeon, for alleged malpractice suffered by the plaintiff while undergoing treatment as a patient. On the 1st day of December, 1889, the plaintiff undertook to jump on to an engine of the Ulster & Delaware Railroad, in the city of Kingston, and in doing so slipped, and his left foot was caught by the tender, and a portion thereof crushed. Being destitute, he was taken to the city almshouse, where he was treated by the defendant, who was one of the city physicians having the care of the patients therein, and who was employed for that purpose. Thereafter, and on the 10th day of December, he amputated the plaintiff's leg above the ankle-joint, and six or seven days thereafter, gangrene having set in, he again amputated the leg, at the knee-joint. After the second amputation the leg did not properly heal, but became a running sore, and at the time of the trial the bone protruded some three or four inches. Evidence was given upon the trial from which the jury might find that the bones of the foot were so crushed that immediate amputation of the injured portions was necessary, and that the appearance of gangrene was in consequence of the delay of ten days in the operation; and that in the second operation the defendant neglected to save flap enough to cover the end of the limb and bone, and that the subsequent protrusion of the bone was owing to this neglect. The question of the defendant's liability consequently became one for the jury. We are aware that he claimed to have waited ten days before operating for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intel-

ligence. He engages to bring to the treatment of his patient care, skill, and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot.

* * * * *

The defendant moved to dismiss the complaint upon the ground that it failed to show a contract relation between the parties, whereby the defendant was employed to attend the plaintiff, and that no facts were alleged showing it to be the duty of the defendant to treat him in a skillful manner. This motion being denied, the defendant asked the court to charge that, as the defendant treated the plaintiff gratuitously, he is liable, if at all, only for gross negligence, which was refused. It has been held that the fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill, and diligence. (*McCandless v. McWha*, 22 Pa. St. 261-269; *McNevins v. Lowe*, 40 Ill. 209; *Gladwell v. Steggall*, 5 Bing. N. C. 733.) But we do not deem it necessary to consider or determine this question, for it appears that the plaintiff's services were not gratuitously rendered. He was employed by the city as one of the physicians to attend and treat the patients that should be sent to the almshouse. The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill.

The judgment should be affirmed, with costs.

EWING v. PITTSBURGH RY. CO.

(147 Penn. St. 40. — 1892.)

PER CURIAM. The wrong of which the plaintiff Eva Ewing complains was a collision of cars upon the railway of the defendant company, in consequence of which the cars "were broken, overturned, and thrown from the track, and fell upon the lot and premises of the plaintiff, and against and upon the dwelling house of plaintiff, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing, then being in said

dwelling house, and subjected her to great fright, alarm, fear, and nervous excitement and distress, whereby she then and there became sick and disabled, and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby permanently weakened and disabled," etc. To this statement the defendant demurred, and the court below entered judgment for defendant upon said demurrer. This ruling is assigned as error. It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she had received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as "accident cases" will be very greatly enlarged; for in every case of a collision on a railroad the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for the "fright" to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge.

Negligence constitutes no cause of action unless it expresses or establishes some breach of duty. (Add. Torts, § 1338.) What duty did the company owe this plaintiff? It owed her the duty not to injure her person by force or violence; in other words, not to do that which, if committed by an individual, would amount to an assault upon her person. But it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and, if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause. The rule on this subject is as follows: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been seen by the wrong-doer as likely to flow from his act." (*Rail-*

way Co. v. Taylor, 104 Pa. St. 306; *Township of West Mahanoy v. Watson*, 112 Pa. St. 574.) Tested by this rule, we regard the injury as too remote. We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. Wood fairly states the rule in his note to Mayne on Damages at page 74: "So far as I have been able to ascertain, the force of the rule is that the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action." In *Wyman v. Leavitt*, 71 Me. 227, a contractor of a railroad was blasting rocks within the right of way of the road. The blast blew rocks upon the plaintiff's land, and, in addition to the damage to the land, plaintiff claimed damages for fright, caused by apprehension of personal injury. *Held*, that he could not recover. Our own recent case of *Fox v. Borkey*, 126 Pa. St. 164, was a case of fright from blasting, and it was said by our Brother Mitchell: "The injury was not the natural or proximate result of the act complained of." In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Wensleydale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." To the same point are *Railway Co. v. Stables*, 62 Ill. 313; *Canning v. Williamstown*, 1 Cush. 451; *Johnson v. Wells*, 6 Nev. 224. We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of, or accompanied by, a personal injury, and have no application to the case in hand.

Judgment affirmed.

PURCELL v. ST. PAUL CITY RY. CO.

(48 Minn. 134. — 1892.)

GILFILLAN, C. J. Appeal from an order overruling a general demurrer to the complaint. From the complaint it appears that the plaintiff was a passenger on one of defendant's cars running upon its line on Jackson street, St. Paul; that, when the car reached the intersection of that line with the defendant's cable-car line running on East Seventh street, the persons in charge of it negligently attempted to cross, and did cross, the cable line in front of a then near and rapidly approaching cable train thereon; that a collision seemed so imminent, and was so nearly caused, that the incident and attending confusion of ringing alarm-bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of immediate death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness. The complaint shows a duty on the part of the defendant to exercise the highest degree of care to carry the plaintiff safely. It also shows negligence in respect to that duty, and, if the negligence caused what the law regards as actionable injury, the action is well brought. Of course, negligence without injury gives no right of action. On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or a leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is in law a proximate cause is well expressed in the definition, often quoted with approval, given in *Railroad Co. v. Kellogg*, 94 U. S. 469, as follows: "The primary cause may be the proximate cause of a disaster, though it operate through successive instruments; as, an article at the end of a chain may

be moved by a force applied to the other end, that force being the proximate cause of the movement; or, as in the oft-cited case of the squib thrown in the market place. (*Scott v. Shepherd*, 2 W. Bl. 892.) The question always is, was there an unbroken connection between the wrongful act and the injury, — a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" There may be a succession of intermediate causes, each produced by the one preceding and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease, a mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of — was brought about, caused by — the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes. If a passenger be placed, by the carrier's negligence, in apparent, imminent peril, and, obeying the natural instinct of self-preservation, endeavors to escape it by leaping from the car or coach, and in doing so is injured, he may, if there be no contributory negligence on his part, recover for the injury, although, had he remained in the car or coach, he would not have been injured. The endeavor to escape is not of itself contributory negligence.

(*Wilson v. Railroad Co.*, 26 Minn. 278.) In such case, though there comes, as an intermediate cause between the negligence and injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury. The defendant suggested that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences. Certainly a woman in her condition has as good a right to be carried as any one, and is entitled to at least as high a degree of care on the part of the carrier. It may be that, where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury. If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion.

Order affirmed.

CHAPTER III.

PERSONS AFFECTED BY TORTS.

**SECTION 2. DAMAGES FOR DEATH: ADMIRALTY RULE.
THE "HARRISBURG."**

(119 U. S. 199. — 1886.)

THIS is a suit *in rem* begun in the District Court of the United States for the Eastern District of Pennsylvania, on the 25th of February, 1882, against the steamer "Harrisburg," by the widow and child of Silas E. Richards, deceased, to recover damages for his death caused by the negligence of the steamer in a collision with the schooner "Marietta Tilton," on the 16th of May, 1877, about one hundred yards from the Cross Rip Light Ship, in a sound of the sea embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the State of Massachusetts. The steamer was engaged at the time of the collision in the coasting trade, and belonged to the port of Philadelphia, where she was duly enrolled according to the laws of the United States. The deceased was first officer of the schooner, and a resident of Delaware, where his widow and child also resided when the suit was begun. Reported below in 15 Fed. Rep. 610.

Mr. Thomas Mart, Jr., for appellant.

Mr. Henry Flanders for appellees.

MR. CHIEF JUSTICE WAITE. The question to be decided presents itself in three aspects, which may be stated as follows:

1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea,

caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor?

2. If not, can a suit *in rem* be maintained in admiralty against an offending vessel for the recovery of such damages when an action at law has been given therefor by statute in the State where the wrong was done, or where the vessel belonged?

3. If it can, will the admiralty courts permit such a recovery in a suit begun nearly five years after the death, when the statute which gives the right of action provides that the suit shall be brought within one year?

It was held by this court, on full consideration, in *Insurance Company v. Brame*, 95 U. S. 756, "that by the common law no civil action lies for an injury which results in death." (See, also, *Dennick v. Railroad Co.*, 103 U. S. 11, 21.) Such also is the judgment of the English courts, where an action of the kind could not be maintained until Lord Campbell's Act, 9 and 10 Vict. c. 93. It was so recited in that act, and so said by Lord Blackburn in *Seward v. The Vera Cruz*, 10 App. Cas. 59, decided by the House of Lords in 1884. Many of the cases bearing on this question are cited in the opinion in *Insurance Co. v. Brame*. Others will be found referred to in an elaborate note to *Carey v. Berkshire Railroad*, 1 Cush. 475; in 48 Am. Dec. 616, 633. The only American cases in the common-law courts against the rule, to which our attention has been called, are *Cross v. Guthery*, 2 Root, 90; S. C. 1 Am. Dec. 61; *Ford v. Monroe*, 20 Wend. 210; *James v. Christy*, 18 Missouri, 162; and *Sullivan v. Union Pacific Railroad*, 3 Dillon, 334. *Cross v. Guthery*, a Connecticut case, was decided in 1794, and cannot be reconciled with *Goodsell v. Hartford & New Haven Railroad*, 33 Conn. 55, where it is said: "It is a singular fact, that by the common law the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy." *Ford v. Munroe*, a New York case, was substantially overruled by the Court of Appeals of that State in *Green v. Hudson River Railroad*, 2 Keyes, 294; and *Sullivan v. Union Pacific Railroad*, decided in 1874 by the Circuit Court of the United States for the District of Nebraska, is directly in conflict with *Insurance Co. v. Brame*, decided here in 1878.

We know of no English case in which it has been authoritatively decided that the rule in admiralty differs at all in this particular from that at common law. Indeed, in *The Vera Cruz*, *supra*, it was decided that even since Lord Campbell's Act a suit *in rem* could not be maintained for such a wrong. Opinions were delivered in that case by the Lord Chancellor (Selborne), Lord Blackburn and Lord Watson. In each of these opinions it was assumed that no such action would lie without the statute, and the only question discussed was whether the statute had changed the rule.

In view, then, of the fact that in England, the source of our system of law, and from a very early period one of the principal maritime nations of the world, no suit in admiralty can be maintained for the redress of such a wrong, we proceed to inquire whether, under the general maritime law as administered in the courts of the United States, a contrary rule has been or ought to be established.

In *Plummer v. Webb*, 1 Ware, 75, decided in 1825, Judge Ware held, in the District Court of the United States for the District of Maine, in an admiralty suit *in personam*, that "the ancient doctrine of the common law, founded on the principles of the feudal system, that a private wrong is merged in a felony, is not applicable to the civil polity of this country, and has not been adopted in this state" (Maine), and that "a libel may be maintained by a father, in the admiralty, for consequential damages resulting from an assault and battery of his minor child," "after the death of the child, though the death was occasioned by the severity of the battery;" but the suit was dismissed, because upon the evidence it did not appear that the father had in fact been damaged. The case was afterwards before Mr. Justice Story on appeal, and is reported in 4 Mason, 380, but the question now involved was not considered, as the court found that the cause of action set forth in the libel and proved was not maritime in its nature.

We find no other reported case in which this subject was at all discussed until *Cutting v. Seabury*, 1 Sprague, 522, decided by Judge Sprague in the Massachusetts district in 1860. In that case, which was *in personam*, the judge said that "the weight of authority in the common-law courts seems to be

against the action, but natural equity and the general principles of law are in favor of it," and that he could not consider it "as settled that no action can be maintained for the death of a human being." The libel was dismissed, however, because on the facts it appeared that no cause of action existed even if in a proper case a recovery could be had. The same eminent judge had, however, held as early as 1849, in *Crapo v. Allen*, 1 Sprague, 185, that rights of action in admiralty for mere personal torts did not survive the death of the person injured.

Next followed the case of *The Sea Gull*, Chase's Dec. 145, decided by Chief Justice Chase in the Maryland district in 1867. That was a suit *in rem* by a husband to recover damages for the death of his wife caused by the negligence of the steamer in a collision in the Chesapeake Bay, and a recovery was had, the Chief Justice remarking that "there are cases, indeed, in which it has been held that in a suit at law no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures," and "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." In his opinion he refers to the leading English case of *Baker v. Bolton*, 1 Camp. 493, where the common-law rule was recognized and followed by Lord Ellenborough in 1808, and to *Carey v. Berkshire Railroad*, 1 Cush. 475; *S. C.* 48 Am. Dec. 616, to the same effect, decided by the Supreme Court of Massachusetts in 1848, and then says that "in other States the English precedent has not been followed." For this he cites as authority *Ford v. Munroe*, *supra*, decided in 1838, but which, as we have seen, had been overruled by *Green v. Hudson River Railroad* in 1866, only a short time before the opinion of the Chief Justice was delivered, and *James v. Christy*, 18 Missouri, 162, decided by the Supreme Court of Missouri in 1853. The case of *The Highland Light*, Chase's Dec. 150, was before Chief Justice Chase in Maryland about the same time with

The Sea Gull, and while adhering to his ruling in that case, and remarking that "the admiralty may be styled, not improperly, the human providence which watches over the rights and interests of those 'who go down to the sea in ships and do their business on the great waters,'" he referred to a Maryland statute giving a right of action in such cases, and then dismissed the libel because on the facts no liability was established against the vessel as an offending thing.

Afterwards, in 1873, Mr. Justice Blatchford, then the judge of the District Court for the Southern District of New York, sustained a libel by an administrator of an infant child who took passage on the steamer "City of Brussels" with its mother at Liverpool, to be carried to New York, and while on the voyage was poisoned by the carelessness of the officers of the vessel and died on board. (*City of Brussels*, 6 Ben. 370.) The decision was placed on the ground of a breach of the contract of carriage.

The next case in which this jurisdiction was considered is that of *The Towanda*, 34 Leg. Int. (Philadelphia) 394; *S. C.* under the name of *Coggins v. Helmsley*, 5 Cent. Law Jour. 418, decided by Judge McKennan in the Circuit Court for the Eastern District of Pennsylvania in 1877, and before the judgment of this court in *Insurance Co. v. Brame*, *supra*. In that case the ruling of Chief Justice Chase in *The Sea Gull* was approved, and the same authorities were cited, with the addition of *Sullivan v. Union Pacific Railroad*, *supra*.

In *The Charles Morgan*, 2 Flip. 274, before Judge Swing, in the Southern District of Ohio on the 24th of October, 1878, the subject was again considered. That was a suit *in rem*, by the wife of a passenger on a vessel, to recover damages for the death of her husband; and in deciding upon the sufficiency of a plea to the jurisdiction, the judge, after quoting a remark of Mr. Justice Clifford in *The Steamboat Co. v. Chase*, 16 Wall. 532, that "difficulties, it must be conceded, will attend the solution of this question, but it is not necessary to decide it in this case," retained the libel because, "as the case at bar will probably go to the Supreme Court of the United States, it will be better for all parties that the appeal should be taken after a trial upon its merits." Our decision in *Insurance Co. v.*

Brame was announced on the 21st of January, 1878, but was evidently not brought to the attention of the judge, because, while citing quite a number of cases to show that the weight of authority was in favor of the English rule, he makes no reference to it. Indeed, it is probable that the volume of the reports in which it appears had not been generally distributed when his opinion was filed.

It thus appears that prior to the decision in *Insurance Co. v. Brame* the admiralty judges in the United States did not rely for their jurisdiction on any rule of the maritime law different from that of the common law, but on their opinion that the rule of the English common law was not founded in reason, and had not become firmly established in the jurisdiction of this country. Since that decision the question has been several times before the Circuit and District Courts for consideration. In *The David Reeves*, 5 Hughes, 89, Judge Morris, of the Maryland district, considering himself bound by the authority of *The Sea Gull*, which arose in his district, and had been decided by the Chief Justice in the Circuit Court, maintained jurisdiction of a suit *in rem* by a mother for the death of her son in a collision that occurred in the Chesapeake Bay. He conceded, however, that this was contrary to the common law and to the admiralty decisions in England, but as the question never had been passed on in this court, he yielded to the authority of the Circuit Court decision in his own district.

The case of *Holmes v. Oregon and California Railway*, 6 Sawyer, 262; *S. C.* 5 Fed. Rep. 75, was decided by Judge Deady, in the Oregon district, on the 28th of February, 1880, and he held that a suit *in personam* could be prosecuted in admiralty against the owner of a ferry-boat engaged in carrying passengers across the Wallamet river, between East Portland and Portland, for the death of a passenger caused by the negligence of the owner. He conceded that no such action would lie at common law, but, as in his opinion the civil law was different, he would not admit that in admiralty, "which is not governed by the rules of the common law," the suit could not be maintained. His decision was, however, actually put on the Oregon statute, which gave an action at law for

damages in such a case, and the death occurred within the jurisdiction of the State. Judge Sawyer had previously decided, in *Armstrong v. Beadle*, 5 Sawyer, 484, in the Circuit Court for the District of California, that an action at law under a similar statute of California, would not lie for a death which occurred on the high seas and outside of the territorial limits of the State. In *The Clatsop Chief*, 7 Sawyer, 274; S. C. 8 Fed. Rep. 163, Judge Deady sustained an action *in rem* against an offending vessel for a death caused by negligence in the Columbia river and within the State of Oregon.

In *The Long Island North Shore Passenger and Freight Trans. Co.*, 5 Fed. Rep. 599, which was a suit for the benefit of the act of Congress limiting the liability of the owners of vessels, Judge Choate, of the Southern District of New York, decided that in New York, where there is a statute giving a right of action in cases of death caused by negligence, claims for damages of that character might be included among the liabilities of the owner of the offending vessel. In that case the injury which caused the death occurred within the limits of the State. In the opinion it is said (p. 608): "It has been seriously doubted whether the rule of the common law, that a cause of action for an injury to the person dies with the person, is also the rule of the maritime law. There is some authority for the proposition that it is not, and that in admiralty a suit for damage in such a case survives. (*The Sea Gull*, 2 L. T. R. 15; S. C. Chase's Dec. 145; *Cutting v. Seabury*, 1 Sprague, 522; *The Guldfaxe*, 19 L. T. R. 748; S. C. L. R. 2 Ad. & Ecc. 325; *The Epsilon*, 6 Ben. 379, 381.) But, however it may be in respect to the original jurisdiction of admiralty courts, I see no valid reason why the right of a person whom, under the municipal law governing the place of the transaction and the parties to it, the title to the chose in action survives, or a new right to sue is given for damages resulting from a tort, the admiralty courts, in the exercise of their jurisdiction *in personam* over marine torts, should not recognize and enforce the right so given." The case was decided on the 12th of February, 1881, and on the 21st of the same month Judge Brown, of the Eastern District of Michigan, in *The Garland*, 5 Fed. Rep.

924, held that a suit *in rem* could be maintained by a father for the loss of the services of his two sons, killed in a collision in the Detroit river. In his opinion he said: "Were this an original question, . . . I should feel compelled to hold that this libel could not be maintained. But other courts of admiralty in this country have furnished so many precedents for a contrary ruling, I do not feel at liberty to disregard them, although I am at a loss to understand why a rule of liability differing from that of the common law should obtain in these courts." His decision was, however, finally put on a statute of Michigan which gave an action at law for such damages.

In *The Sylvan Glen*, 9 Fed. Rep. 335, Judge Benedict, of the Eastern District of New York, dismissed a suit *in rem* on the ground that the statute of New York giving an action for damages in such cases created no maritime lien. This case was decided on the 4th of October, 1881. At November term, 1882, of the Circuit Court for the Eastern District of Louisiana, Judge Billings decided, in *E. B. Ward, Jr.*, 4 Woods, 145; *S. C.* 16 Fed. Rep. 255, that a suit *in rem* could not be maintained for damages for the death of a person in a collision on the high seas through the fault of a vessel having its home port in New Orleans, as the statute of Louisiana did not apply to cases where the wrongful act which caused the death occurred outside of the State. Afterwards, in June, 1883, Judge Pardee, of the Circuit Court for the same district, decided otherwise. (*The E. B. Ward, Jr.*, 17 Fed. Rep. 456.) In his opinion he said (p. 459): "Upon the whole case, considering the natural equity and reason of the matter, and the weight of authority as determined by the late adjudicated cases in the admiralty courts of the United States, I am inclined to hold that the ancient common-law rule, *actio personalis moritur cum persona*, if it ever prevailed in the admiralty law of this country, has been so modified by the statutory enactments of the various States and the progress of the age, that now the admiralty courts 'are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another,' and enforce an adequate remedy. At all events, as the question is an open one, it is best to resolve the doubts in favor of what all judges consider to be 'natural equity and justice.'" He also was of opinion that, as the offend-

ing vessel was wholly owned by citizens of Louisiana, and the port of New Orleans was her home port, the Louisiana statute applied to her, and that the court of admiralty could enforce such a right of action in a proceeding *in rem*. (See, also, *The E. B. Ward, Jr.*, 23 Fed. Rep. 900.)

The case of *The Manhasset*, 18 Fed. Rep. 918, was decided by Judge Hughes, of the Eastern Virginia District, in January, 1884, and in that it was held that a suit *in rem* could not be maintained by the administratrix against a vessel, under the statute of Virginia which gave an action for damages caused by the death of a person, even though the tortious act was committed within the territorial limits of the State, but that the widow and child of the deceased man had a right of action, by a libel *in rem*, under the general maritime law, which they could maintain in their own names and for their own benefit. In so deciding the judge said: "The decision of Chief Justice Chase in the case of *The Sea Gull*, *supra*, establishes the validity of such a libel in this circuit. I would maintain its validity independently of that precedent. Such a right of action is a maritime right, conferred by the general law maritime (Domat. Civil Law, pt. 1, bk. 2, tit. 8, § 1, art. 4; Grotius, lib. 2, c. 17, § 13; Ruth. Inst. 206; Bell, Prin. Sc. Laws, p. 748, § 2029; Ersk. Inst. bk. 4, tit. 4, § 105); and is not limited as to time by the twelve months' limitation of the State statute."

The last American case to which our attention has been called is that of *The Columbia*, 27 Fed. Rep. 900, decided by Judge Brown of the Southern District of New York, during the present year. In giving his opinion, after referring to the fact that, as he understood, the question was then pending in this court, the judge said: "Awaiting the result of the determination of that court, and without referring to the common-law authorities, I shall hold in this case, as seems to me most consonant with equity and justice, that the pecuniary loss sustained by persons who have a legal right to support from the deceased, furnishes a ground of reclamation against the wrong-doer which should be recognized and compensated in admiralty."

In *Monaghan v. Horn, in re The Garland*, 7 Canada Sup. Ct. 409, the Supreme Court of Canada held that a mother could not sue in her own name in admiralty for the loss of the

life of her son, on the ground that no such action would lie without the aid of a statute, and the statute of the Province of Ontario, where the wrong was done, and which was substantially the same as Lord Campbell's act, provided that the action should be brought in the name of the administrator of the deceased person. No authoritative judgment was given as to the right of an administrator to sue in admiralty under that act. This was in 1882, before *The Vera Cruz*, *supra*, in the House of Lords.

Such being the state of judicial decisions, we come now to consider the question on principle. It is no doubt true that the Scotch law "takes cognizance of the loss and suffering of the family of a person killed," and gives a right of action therefor under some circumstances. (Bell's Prin. Laws of Scot., 7th ed., p. 934, § 2029; *Cadell v. Black*, 5 Paton, 567; *Weems v. Mathieson*, 4 Macqueen, 215.) Such also is the law of France. (28 Merlin, Répertoire, 442, *verbo* Réparation Civile, § iv; *Roland v. Gosse*, 19 Sirey (Cour de Cassation) 269.) It is said also that such was the civil law, but this is denied by the Supreme Court of Louisiana in *Hubgh v. The New Orleans & Carrollton Railroad*, 6 La. Ann. 495; *S. C.* 54 Am. Dec. 565, where Chief Justice Eustis considers the subject in an elaborate opinion after full argument. A reargument of the same question was allowed in *Hermann v. New Orleans & Carrollton Railroad*, 11 La. Ann. 5, and the same conclusion reached after another full argument. (See also Grueber's *Lex Aquilia*, 17.) But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx.; nor in the Marine Ordinance of Louis XIV., 2 Pet. Adm. Dec. Appx.; and the understanding of the leading text writers in this country has been that no such action will lie in the absence of a statute, giving a remedy at law for the wrong. (Benedict Adm., 2d ed., § 309; 2 Parsons' Ship. & Adm. 350; Henry, Adm. Jur. 74.) The argument everywhere in support of such suits in admiralty has been, not that the

maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to "natural equity and the general principles of law." Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such actions will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule.

* * * * *

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the libel.¹

STATUTORY DAMAGES FOR DEATH.

HOUGHKIRK v. PRES'T, ETC. D. & H. C. Co.

(92 N. Y. 219. — 1883.)

Henry Smith for appellant.

E. Countryman for respondent.

FINCH, J. The jury in this case rendered a verdict of \$5000 as their estimate of damages resulting to the next of kin from the death of a little girl killed by a switch engine of the defendant. The evidence showed that she was about six years old; an only child; bright, intelligent and healthy;

¹ Cf. *Grosso v. Ry. Co.*, 50 N. J. L. 317.

and the daughter of a market gardener. This, and the circumstances of her death, constituted the only proof bearing on the question of damages, and which served as a basis for the judgment of the jury in estimating the pecuniary loss suffered by the next of kin. The General Term declined to set aside the verdict as excessive, assigning as a reason in the opinions delivered that the doctrine of this court as to damages in such a case leaves it impossible to say in any instance that they are excessive, and involves an utter surrender of the right of the General Term to order a new trial for that reason. The defendant alleges error in this ruling, and insists that the verdict was wholly unwarranted by the evidence; that there was no proof of facts from which even a plausible conjecture of the amount of damages could be derived; that the verdict indicated partiality or prejudice; and the case should be remitted to the General Term for the consideration which had been withheld. We have quite carefully examined the authorities cited in the opinion below (*Ihl v. Forty-second St. &c. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450; *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 310; *O'Mara v. Hudson R. R. R. Co.*, 38 id. 445; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 id. 417); and nearly or quite all of the other cases bearing on the subject. Most of them recognize the difficulties inherent in suits founded upon the statute, and seek in good faith to make operative the will of the legislature in a new and before unknown class of actions. None of those decisions purport in any manner to narrow the right and discretion of the General Term to set aside verdicts for excessive damages, but on the contrary all are consistent with its survival, and some expressly recognize it. (*Oldfield v. N. Y. & Harlem R. R. Co.*, 14 N. Y. 314; *Ihl v. Forty-second St. &c. R. R. Co.*, 47 id. 321; 7 Am. Rep. 450.) Undoubtedly there are difficulties in the way of its judicious exercise, but so far as these exist they spring from the inherent nature of the subject, and obedience to the command of the legislature. The statute implies from the death of the person negligently killed damages sustained by the next of kin. (*Quin v. Moore*, 15 N. Y. 432.) Recognizing the generally prospective and indefinite character of those damages, and the impossibility of

a basis for accurate estimate, it allows a jury to give what they shall deem a just compensation, and limits their judgment to a sum not exceeding \$5000. (*Tilley v. Hudson Riv. R. R. Co.*, 29 N. Y. 252.) But within that range the jury is neither omnipotent, nor left wholly to conjecture. They are required to judge, and not merely to guess, and, therefore, such basis for their judgment as the facts naturally capable of proof can give should alway be present, and is rarely, if ever, absent. The pecuniary loss in any such case may be composed of very different elements. It may consist of special damages, that is of an actual, definite loss, capable of proof, and of measurement with approximate accuracy ; and also of prospective and general damages, incapable of precise and accurate estimate because of the contingencies of the unknown future. An example of such special and actual damages occurred in the case of *Murphy v. N. Y. Central &c. R. R. Co.*, 88 N. Y. 446, where we allowed as one element of the total loss the funeral expenses of the deceased. To such an item the doctrine of *Leeds v. Met. Gas-light Co.*, 90 N. Y. 26, would have a proper application. To prove merely that there were funeral expenses, and, without evidence of their character or amount, or even that they were usual and ordinary, to permit the jury to guess at their amount as an element of the total loss, would be to substitute conjecture for proof where proof was possible, and a proper basis of judgment attainable. But the value of a human life is a different matter. The damages to the next of kin in that respect are necessarily indefinite, prospective and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such case there is and there must be some basis in the proof for the estimate, and that was given here and always has been given. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased ; these elements furnish some basis for judgment. That it is slender and inadequate is true (*Tilley v. Hudson River R. R. Co.*, *supra*) ; but it is all that is possible and while that should

be given (*McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. 289), more cannot be required. Upon that basis, and from such proof the jury must judge, and having done so, it is possible, though not entirely easy, for the General Term to review such judgment and set it aside if it appears excessive, or the result of sympathy and prejudice. A difficult duty we grant; but not for that reason to be abandoned. In its intrinsic nature it is no more difficult than to determine whether a verdict is excessive in an action for slander or libel where the injury is to reputation, or in actions where pain and suffering may be considered in ascertaining the loss. The Supreme Court has never abdicated its power of review in such cases and should not in those under the statute. The jury are compelled to judge in an atmosphere freighted with sympathy. In the General Term the deliberation may be more cool and thoughtful, and while the judgment of the trial court should not be lightly disturbed, it should not be held necessarily conclusive. But it is impossible for us to say that such error has been committed in the present case. We cannot go to the opinions delivered to ascertain, and must assume that the order which denied a new trial for excessive or partial damages, and which was affirmed by the General Term, was made after due and proper consideration, and in the full performance of the duty of review which we have always upheld and have not at all narrowed or infringed.¹

The judgment was reversed on another ground.

WOODEN *v.* WESTERN N. Y. & C. Co.

(26 N. E. REP. 1050. — 1891. N. Y. Ct. of App.)

APPEAL from superior court of Buffalo, General Term.

John G. Milburn for appellant.

¹ Exemplary damages not recoverable unless statute permits. (*Myers v. San Francisco*, 42 Cal. 215; *Houston & Co. v. Cowser*, 57 Tex. 293.) Insurance policy not to be deducted from damages. (*North Penn. Co. v. Kirk*, 90 Penn. St. 15.) As to damages where deceased is minor, see *Burton v. Chicago & C. Ry.*, 55 Ia. 496; *Johnson v. Chicago & C. Co.*, 64 Wis. 425.

Harlow C. Curtiss for respondent.

FINCH, J. This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this State, and the defendant a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining State of Pennsylvania, and the complaint alleged that in that State the plaintiff's husband was killed by the negligence of the defendant company. The complaint further averred that the statutes of that State gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such statute was of similiar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of \$20,000. The demurrer interposed, raised two objections: *First*, that the statutes of the two States were not similar, but different; and, *second*, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased; and the final result sought to be established was that the widow could not maintain an action in this State because that it is contrary to our statute, and that the administratrix could not because that is contrary to the Pennsylvania statute: and so there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been explicitly determined in *McDonald v. Mallory*, 77 N. Y. 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another State are sustained here without proof of the *lex loci*, because they are permitted by the common law which is presumed to exist in the foreign State; that such presumption does not arise where the right of action depends

upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the State in which the injury occurred give the right of action, and are similar to our own. Upon the question of similarity we have also held that the two statutes need not be identical in their terms, or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes. (*Leonard v. Navigation Co.*, 84 N. Y. 53.) It is quite evident that the two statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out. The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow; while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. (*Hegerich v. Keddie*, 99 N. Y. 267.) It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest,—those whose injury is redressed, whose right is vindicated, to whom all damages go,—are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two statutes dissimilar under the rule.

It is claimed, however, that, even in that event, the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff, not as a widow, but

as administratrix, to which office she had been appointed in this State. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity. (84 N. Y. 53, *supra*.) That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori*, and measure it by and compare it with the *lex loci*, I think, for two reasons, — one, that the party defendant may not be subjected to different and varying responsibilities; and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity; and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action; and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own. (*Usher v. Railroad Co.*, 126 Pa. St. 207; 17 Atl. Rep. 597.)

But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed \$5000. That restriction pertains to the remedy, rather than the right. (*Dennick v. Railroad Co.*, 103 U. S. 11.) It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action, or its inherent elements and character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations, and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be — there very possibly is — an exception to that rule,

resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the State within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted; and so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmance of the interlocutory judgment. All concur.¹

SECTION 3. MASTER AND SERVANT.

HYDE v. COOPER.

(26 Vt. 552. — 1854.)

TRESPASS for an ox. In this case an officer had sold property on execution without sufficient notice, and the plaintiff in the execution was sued on the theory that he had adopted the officer's tort. The only evidence of adoption was that before the sale he had expressed the opinion that the notice was sufficient, and that he received the money on the execution.

Cooper & Bartlett for defendant.

J. H. Prentiss for plaintiff.

¹ A less liberal policy obtains in some States, partly because of their statutes, e.g. *Taylor's Adm'r. v. Penn. Co.*, 78 Ky. 348; 39 Am. R. 244; *Davis v. N. Y. & N. E. Ry.*, 143 Mass. 301; *Oates v. Union Pac. Ry. Co.*, 16 S. W. 487 (Mo.).

REDFIELD, Ch. J.

* * * * *

No doubt, if the officer takes the property of one man, upon another's debt, or sells at private sale, and the creditor accepts the money, knowing the facts, he may be liable for the acts of the officer. But in such case the acts are not regarded as official. But it would scarcely be consistent, with sound reason, to apply the same rule to all the acts of an officer. It would be almost equivalent to exonerating the officer from all official responsibility.

The views here expressed are strongly confirmed, by the decision in the case of *Abbott v. Kimball*, 19 Vt. 551. As a general rule, perhaps, where the mistake is one of fact, and such as makes the officer a trespasser, and the party knowing all the facts, consents to take the avails of a sale, or where he counsels the very act which creates the liability of the officer, he is implicated, to the same extent as the officer. But when the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, even by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it. And if he does that he cannot maintain an action against the officer for doing the act, and the consequence would be, that if receiving the avails of a sale on execution were to be regarded, in all cases, as amounting to a ratification of the conduct of the officer in the sale, it must preclude the creditor from all suit against the officer on that account, which has never been so regarded. The party may always take money, which the officer informs him he has legally collected, without assuming the responsibility of indorsing the perfect legality of the entire detail of the officer's official conduct in the matter.

For if the officer is compelled to refund to the debtor, on account of his irregularity of procedure, that will not affect the right of the creditor to retain the money. He is still entitled to retain the money against the officer. And the

party cannot claim the money of the creditor without thereby affirming the sale. So that the creditor's accepting the amount of money for which the property sold, is no more a ratification of the conduct of the officer, than if he took the money of the officer on any other liability. The money is the officer's, whether he was a trespasser or not, and he is at all events liable to the creditor. If the sale was irregular, that is his loss, he must still pay the creditor, and accepting the money is but taking pay for the officer's liability to the creditor, for his default in the sale, if it was irregular. So that in any view of the case, there is no ground of implicating the defendant.¹

Judgment affirmed.

WHO IS A SERVANT.

LINNEHAN v. ROLLINS.

(137 Mass. 123. — 1884.)

TORT, against the owners in trust of an estate on Washington street, in the city of Boston, for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants, or of their servants or agents, by the fall of a derrick. Trial in the Superior Court, before Pitman, J., who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show that the injury to the plaintiff was caused by the negligence of the workmen employed by one Elston, who had a written contract with the defendants, by which he agreed "to take down the entire building known as the Adams House in said Boston, belonging to said trustees, or so much thereof as the trustees may request;" and which also provided as follows: "All of said work to be done carefully, and under the direction and subject to the approval of the trustees."

The plaintiff also offered some evidence of negligence on the

¹ *Lewis v. Read*, 13 M. & W. 834; *Dally v. Young*, 13 Ill. App. 39; *Dunn v. H. &c. Ry. Co.*, 43 Conn. 434.

part of one Wentworth, who was employed by the defendant; which evidence was contradicted by other witnesses.

There was also evidence that one or more of the defendants were present nearly every day, and gave directions as to the work being performed; and evidence contradicting this.

The defendants had employed Elston to perform part of the work in taking down the building named in the contract, and had also employed Wentworth and other persons to do other parts of taking down said building.

The judge instructed the jury upon the effect of said contract as follows: "The plaintiff contends that there was negligence both on the part of Wentworth and the men under his employ in placing this derrick, and on the part of Elston in removing this derrick. So far as regards Wentworth, the relation in which he stands to the defendants is a matter of verbal proof, and the principles which I have given you are to be applied in determining upon the evidence what that relation was. So far as Elston is concerned, the relation in which he stood to the defendants at the outset is a matter of written contract, and where there is a written contract between parties, the construction of that written contract is a matter of law. This contract implies in substance that Elston is to take down the entire building known as the Adams House, or so much thereof as the trustees may request; and, in conclusion, that all of the work is to be done carefully, and under the direction and subject to the approval of the trustees. This contract gives the defendants the right to control and direct the action of Elston. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that, in the first instance, he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so as to mean that he, by this contract, was subject to their orders as to the time and manner and mode of doing the work; than they had the right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you to do thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within

the relation of master and servant, so far as Elston and the defendants are concerned. You will observe that, although there has been evidence introduced upon the one side and the other, as to the actual control which the trustees, through one of their number, exercised over the work, and that is all proper and competent evidence for you in considering the matter, yet that the absolute test is not the exercise of power of control, but the right to exercise power of control. If, for instance, there was nothing in the case but this contract, and there was no question that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of Elston, then, although the trustees should be across the Atlantic, nevertheless, under the instructions I give you, if they retained the power to control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly. If they have retained to themselves the right of directing the mode of doing the work, then, if the work is done wrong, the simple principle is that they are responsible."

The jury returned a verdict for the plaintiff, in the sum of \$5500; and the defendants alleged exceptions.

W. B. Gale and J. W. Rollins for the defendants.

S. B. Allen and J. R. Murphy for the plaintiff.

FIELD, J. Whether an owner of a building retains such control over work to be done and the manner of doing it as to render himself responsible for injuries occasioned by the negligence of the contractor and his employees in the performance of the work, depends upon the construction to be given to the contract. (*Erie v. Caulkins*, 85 Penn. St. 247; *Railroad v. Hanning*, 15 Wall. 649; *Eaton v. European & North American Railway*, 59 Maine, 520; *Cincinnati v. Stone*, 5 Ohio St. 38; *Newton v. Ellis*, 5 El. & Bl. 115; *Blake v. Thirst*, 2 H. & C. 20.)

In this case, for the reasons given in the instructions, we

think the defendants are liable for injuries occasioned by the negligence of Elston and his employees in doing the work which the defendants requested Elston to do. (*Railroad v. Hanning, ubi supra*; *Clapp v. Kemp*, 122 Mass. 481; *Brackett v. Lubke*, 4 Allen, 138; *Brooks v. Somerville*, 106 Mass. 271; *Forsyth v. Hooper*, 11 Allen, 419; *Kimball v. Cushman*, 103 Mass. 194.) *Exceptions overruled.*¹

SCOPE OF AUTHORITY.

MAIER v. RANDOLPH.

(33 Ks. 340. — 1885.)

C. N. Sterry for plaintiff in error.

W. A. Randolph for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This action was commenced by W. A. Randolph and A. G. Randolph, partners as Randolph & Randolph, against Frank Maier, before a justice of the peace, and, after judgment, the case was appealed to the district court, in which court it was again tried, before the court and jury, and judgment was rendered in favor of the plaintiffs and against the defendant, for the sum of \$144, and for costs. The defendant, as plaintiff in error, now brings the case to this court.

The case was tried in the district court upon the bill of particulars filed in the justice's court, which alleges, in substance, as follows: The plaintiffs owned a two-year-old thoroughbred Shorthorn bull, and the "defendant, by his employee and agent, without the knowledge and consent of the said plaintiffs,

¹ The general rules on this subject are well stated in *Laurence v. Shipman*, 39 Conn. 586; cf. *Cuff v. Newark &c. Ry. Co.*, 35 N. J. L. 17; 10 Am. R. 205. For a learned discussion of the question when is the employer liable for the negligent act of an independent contractor, see dissenting opinion of Dwight, C., in *McCafferty v. S. D. & P. M. Ry. Co.*, 61 N. Y. 178.

killed said bull; that said plaintiffs were damaged by the killing of said bull in the sum of \$250." We think the bill of particulars presents a cause of action.

* * * * *

We think the evidence showed liability on the part of the defendant. A principal, or master, or employer, is usually liable to third parties for the acts or negligence of his agent or servant while acting within the scope of his employment. Here the defendant instructed his servant to go to a certain place at a certain time and kill a beef. The servant went to such place, at such time, and, finding no animal there except the plaintiff's bull, killed the bull, skinned him, dressed him, and hung his carcass up in the slaughter-house as a beef. Evidently the servant was honestly attempting to obey the master's order, and evidently the servant thought that he was doing so; but he was honestly mistaken. A "beef," according to Webster's Dictionary, may be either a bull, a cow or an ox. The servant was all the time acting for the master, and he killed this bull while in the execution of his master's business, and within the scope of his employment; and therefore his master is liable.

Judgment reversed on other grounds.

COHEN v. D. D. &c. Ry. Co.

(69 N. Y. 170. — 1877.)

APPEAL from order of the General Term of the Superior Court of the city of New York, reversing a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial, and granting a new trial. (Reported below, 8 J. & S. 368.)

This action was brought to recover damages alleged to have been sustained by reason of the negligence of plaintiff's servant. On April 27, 1872, plaintiff was driving along Catharine street, in the city of New York, in a buggy. He had crossed the track of defendant's road, but before the rear part of the

buggy was far enough from the track so that a car could pass without striking it, his further progress was arrested by a blockade of trucks and other vehicles, and he was unable to move forward, and by other vehicles he was prevented from moving in any direction. A car approached on defendant's road, the driver of which, as plaintiff testified, after waiting a moment or two, told the plaintiff to "get off the track." The plaintiff asked him to wait until the trucks moved, promising then to move. The driver said, "Damn you, if you don't get off here; I am late; I will get you off some way or other." The plaintiff said, "You wait a moment; I guess the trucks are moving and I may go." The trucks started and as the plaintiff prepared to move on, the driver started his horses and the platform of the car struck the hind wheels of the buggy and overturned it, thus causing the injury complained of.

Defendant's counsel moved for a nonsuit on the ground, among others, that the car-driver's act was not within the scope of his authority, but was an unlawful and unauthorized act, for which defendant was not responsible.

John M. Scribner, Jr., for the appellant.

Julius Lipman for the respondent.

PER CURIAM. The general rule of law contended for by the appellant, that a master cannot be held liable for the wilful, intentional and malicious act of his servant, whereby injury is caused to a third person, is not disputed. Many limitations and illustrations of the rule will be found in reported cases, and it is not always easy to apply the rule. It has recently been under consideration in this court in the case of *Rounds v. The Delaware Lack. & Western R. R. Co.*, 64 N. Y. 129, and in the opinion of Andrews, J., in that case, is found a very thorough and satisfactory consideration of the rule and the principles upon which it is founded. The general principles there announced are as follows: To make a master liable for the wrongful act of a servant to the injury of a third person, it is not necessary to show that he expressly authorized the particular act. It is sufficient to show that the servant was

engaged at the time in doing his master's business, and was acting within the general scope of his authority, and this, although he departed from private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury. While the master is not responsible for the wilful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders; if the servant is authorized to use force against another, when necessary, in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant uses more force than is necessary, the master is liable.

The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances of the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.

The master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. But if the servant, under the guise and cover of executing his master's orders, and executing the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury, then the master is not liable.

When it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury not done with a view to the master's service, or for the purpose of executing his orders.

The application of these principles to the facts of this case leaves no doubt that the case was properly disposed of by the General Term of the Supreme Court. The driver was driving this car for the defendant, and in its business. As the car could only run upon the railroad track, it was his duty, so far as he reasonably and peaceably could, to overcome obstacles

on the track in the way of his car ; and in driving his car and overcoming these obstacles, he was acting within the general scope of his authority. If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear, upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and purposes of the driver, and of the character and quality of his acts.

The order must be affirmed and judgment absolute ordered against the defendant with costs.

*Order affirmed and judgment accordingly.*¹

All concur.

FELLOW-SERVANTS.

CRISPIN v. BABBITT.

(81 N. Y. 516. — 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by defendant's negligence.

At the time of the accident, plaintiff was working as a

¹ Cf. *Isaacs v. Third Ave. Ry. Co.*, 47 N. Y. 122; *Golden v. Newbrand*, 52 Ia. 59; *Gilliam v. South & C. Ry.*, 70 Ala. 268; *Toledo &c. Ry. v. Harmon*, 47 Ill. 297; *Wright v. Wilcox*, 19 Wend. 343; *Levi v. Brooks*, 121 Mass. 501; *Haack v. Fearing*, 4 Abb. N. S. 297.

laborer in the iron works of the defendant, at Whitesboro, Oneida County. Plaintiff had assisted to draw a boat into a dry dock connected with the works; after the boat was in the dry dock, it became necessary to pump out the water; this was done by means of a pump, worked by an engine. While plaintiff, with others, was engaged in lifting the fly wheel of the engine off its centre, one John L. Babbitt carelessly let the steam on and started the wheel, throwing the plaintiff on to the gearing wheels, and thus occasioning the injuries complained of. Defendant lived in the city of New York, coming about once a month, for a day or two, to the iron works, of which, as the evidence tended to show, said Babbitt had general charge; being at one time the general superintendent and manager, at another time styled "business and financial man." The substance of the evidence, as to the position occupied by Babbitt, and the particulars of the accident, are fully set forth in the dissenting opinion of Earl, J. The defendant's counsel requested the court to charge, among other things, as follows:

"13th. That although John L. Babbitt may, as financial agent or superintendent, or overseer or manager, have represented defendant and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager."

The court so charged.

"14th. That as to any other acts or duties performed by him in or about the defendant's works at Whitesboro, or in or about the defendant's business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and as a fellow-servant of the plaintiff."

The court refused so to charge, saying: "I will leave that as a question of fact for the jury."

"17th. That if John L. Babbitt did let on the steam while plaintiff was engaged at the wheel, he was not, in so doing, acting in the defendant's place, but his act in so doing was his own act, and not the act of the defendant."

The court refused so to charge, leaving this also for the jury.

To the refusals to charge, defendant's counsel duly excepted.

A. J. Vanderpool for appellant.

Nicholas E. Kernan for respondent.

RAPALLO, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondeat superior*.

If the employee whose negligence causes the injury is a fellow-servant of the one injured, the doctrine does not apply. (*Conway v. Belfast &c. Ry. Co.*, 11 Irish C. L. 353.)

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz. : to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. (*Albro v. Agawam Canal Co.*, 6 Cush. 75; *Conway v. Belfast Ry. Co.*, *supra*; *Wood's Master and Servant*, § 438. See, also, §§ 431, 436, 437.) On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to some inferior employee. On this principle the *Flike case* (53 N. Y. 549) was decided. Church, Ch. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant, for its improper performance. (Wood's Master and Servant, § 438.) The citation which the court read to the jury from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent *in supplying and maintaining the suitable instrumentalities for the work required is a breach of duty for which the master is liable.*" These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative, for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employee. As between a master and servant it was servant's, and not master's duty to operate the machinery.

*The judgment should be reversed.*¹

MASTER AND SERVANT.

DEMPSEY v. CHAMBERS.

(154 Mass. 330. — 1891.)

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken

¹ In an elaborate dissenting opinion, with which Danforth and Finch, JJ., concurred, Earl, J., rejected the doctrine that an employee could sustain the dual relationship of vice-principal and fellow-servant, citing *Berea Stone Co. v. Kraft*, 31 Ohio St. 287. The same view is taken in *Gormly v. Vulcan Iron Works*, 61 Mo. 492. The doctrine of the principal case is generally followed. (See *Quinn v. N. J. L. Co.*, 23 Fed. 363; *Doughty v. Penobscot &c. Co.*, 76 Me. 143; *Benson v. Goodwin*, 147 Mass. 237.) *Chicago &c. Co. v. Ross* reports a different rule and is criticised in *Loughlin v. State*, 105 N. Y. 159. A different rule applies where the master is not the same, though employment is common. (*Kelly v. Johnson*, 128 Mass. 530; *Louisville &c. Co. v. Conroy*, 63 Miss. 652; *Phillips v. Chicago &c. Co.*, 64 Wis. 475.) The *Ross* case has been limited by subsequent decisions of the Sup. Ct. (See *Balt. & O. Ry.*, 149 U. S. 368.)

As to liability of employer for failure to make proper rules, see *McGovern v. C. V. Ry. Co.*, 123 N. Y. 280; *Ford v. L. S. & M. S. Ry.*, 124 N. Y. 493. For failure to provide safe place to work, *Arkerson v. Dennison*, 117 Mass. 407. For failure to provide safe machinery, *McGinnis v. Can. S. Ry.*, 49 Mich. 466; 8 Am. & E. Ry. Cases, 135, with note. For failure to warn of danger, *Coombs v. N. B. Cordage Co.*, 102 Mass. 572; 3 Am. R. 506. For failure to provide suitable superintendent or fellow-servants. *Mann v. D. & H. Co.*, 91 N. Y. 495.

For statutory changes in the law of co-service in the U. S., see 6 L. Q. Rev. 189.

by the negligence of one McCulloch while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCulloch was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCulloch in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCulloch, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "feigned to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frankpledge. (*Byington v. Simpson*, 134 Mass. 169, 170; Fitzh. Abr. "Corone," pl. 428.) Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. (*New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381, 382; *Fuller & Trimwell's Case*, 2 Leon. 215, 216; Sext. Dec. 5, 12; De Reg. Jur. Reg. 9; D. 43, 26, 13; D. 43, 16, 1, § 14, gloss., and cases next cited.)

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man

retained property acquired through the wrongful act of another. (Y. B. 30 Edw. I. 128 (Roll's ed.); 38 Lib. Ass. 223, pl. 9; S. C. 38 Edw. III. 18; 12 Edw. IV. 9, pl. 23. See Plowd. 8 *ad fin.* 27, 31; Bract. 158*b*, 159*a*, 171*b*.) But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. (Y. B. 7 Hen. IV. 34, pl. 1.) This decision is qualified in Fitzh. Abr. "Bayllye," pl. 4, and doubted in Bro. Abr. "Trespass," pl. 86, but it has been followed and approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. (Godb. 109, 110, pl. 129; 2 Leon. 196, pl. 246; *Hull v. Pickersgill*, 1 Brod. & B. 282; *Muskett v. Drummond*, 10 B. & C. 153, 157; *Buron v. Denman*, 2 Exch. 167, 188; *Secretary of State v. Sahaba*, 13 Moore, P. C. 22, 86; *Cheetham v. Mayor, etc.*, L. R. 10 C. P. 249; *Wiggins v. U. S.*, 3 Ct. Cl. 412.)

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (D. 46, 3, 12, § 4; D. 43, 16, 1, § 14; Y. B. 30 Edw. I. 128,) has been changed to the dogma *æquiparatur* ever since the days of Lord Coke. (4 Inst. 317. See Bro. Abr. "Trespass," pl. 113, Co. Litt. 207*a*; Wing. Max. 124; Com. Dig. "Trespass," C, 1; *Railway Co. v. Broom*, 6 Exch. 314, 326, 327, and cases hereafter cited.)

Doubts have been expressed, which we need not consider, whether this doctrine applied to a case of a bare personal tort. (*Adams v. Freeman*, 9 Johns. 117, 118; Anderson and Warberton, JJ., in *Bishop v. Montague*, Cro. Eliz. 824.) If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my

servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. (Sext. Dec. 5, 11, 23.) Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. (*Wilson v. Barker*, 1 Nev. & M. 409, 4 Barn. & Adol. 614; *Smith v. Lozo*, 42 Mich. 6;) as in other cases it has been on the ground that they did not amount to such a ratification as was necessary, (*Tucker v. Jerris*, 75 Me. 184; *Hyde v. Cooper*, 26 Vt. 552.)

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present, when the ratification is established. . . .

The question remains whether the ratification is established. As we understand the bill of exceptions, McCulloch took on himself to deliver the defendant's coal for his benefit, and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit, if taken by itself, but it was so connected with McCulloch's employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. (See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; *Cooley*, Torts, 128, 129.) The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In *Gibson's Case*, Lane, 90, it was agreed that if strangers, as servants to Gibson, but without his precedent appointment, had seized goods by color of his office, and afterwards had misused

the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so; and this proposition is stated as law in Com. Dig. "Trespass," C. 1; *Elder v. Bemis*, 2 Metc. 599, 605. In *Coomes v. Houghton*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

DONOVAN v. LAING.

(1893. — 1 Q. B. 626.)

LORD ESHER, M. R. In this case the plaintiff brings an action against the defendants to recover damages for injuries sustained through the negligent act of a man who is said to have been, at the time of committing the negligent act, a servant of the defendants, for whose negligence the defendants are liable. The facts are undisputed. A firm, Messrs. Jones & Co., were engaged in loading a ship from a quay. They had no crane which they could use for that purpose; but the defendants had one, which they were in the habit of lending out with a man in charge of it. On this occasion they lent the crane, with the man in charge, to Jones & Co., for the purpose of assisting in loading the ship. The ordinary mode of using a crane for loading a ship is well known. The goods to be loaded are fastened to the chain and raised, and then the arm of the crane is swung round, so as to bring the goods over the part of the ship where they are to be placed, which is determined by the people who have control of the loading. How far the crane is to be swung, and how much the chain is to be lowered, depends on what part of the ship the goods are to be placed in, and every act in connection with the working of the crane must be done according to the orders of those who are directing the loading. In this case the crane and the man to work it were lent by the defendants to Jones & Co. for a consideration, and to be used in the manner

I have described. For some purposes no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect and in consequence any one was injured thereby, the defendants might be liable; but the accident in the case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was a servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority; but there is authority for it without going back to an earlier date, in the case of *Rourke v. White Moss Colliery Co.*, (2 C. P. D. 268.) There, one of the questions was, whose servant a man called Lawrence was. He was the general servant of the defendants but he was hired out to another person, and so far as concerned the operation which he performed for that person, and in which he was negligent, he was held not to be the servant of the defendants.

Cockburn, C. J., in that case said: "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal, just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

Nothing can be clearer than that. The man was the servant of the defendants; but he was lent to Whittle, and was negligent in the operation in which Whittle employed him, and he was held, so far as that operation was concerned, to be in the employment of Whittle who had the control of the matter on which he was

engaged, over which his general master had no control. The passage referred to from the judgment of Lord Watson in *Johnson v. Lindsay & Co.*, (1891, A. C. 371,) seems to me to be exactly to the same effect. I only notice the case of *Jones v. Mayor of Liverpool*, (14 Q. B. D. 890,) because Grove, J., seems to have thought there was a difference between the cases of a master lending a general servant for a consideration and lending him gratuitously. It seems to me impossible to say that the consideration has anything to do with the principle on which the servant must be held to be in the employ of one or the other.

In the present case, so far as the working of the crane went and so long as he was working it, the man in charge was the servant of Jones & Co., and was not the servant of the defendants.

The appeal must be dismissed.

BOWEN, L. J. The law on the matter now before us seems to me to be perfectly clear. The question is not who procured the doing of the unlawful act; but depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago, in *Sadler v. Henlock*, (4 E. & B. 570,) in the form of the question, "Did the defendants retain the power of controlling the work?" Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servant and plant under the control of another — that is, he may lend them — and in that case he does not retain control over the work. It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any con-

trol over the work he was to do. The case is on the same lines as *Rourke v. White Moss Colliery Co.*, *supra*, and Lord Watson's decision in *Johnson v. Lindsay & Co.*, *supra*, does not differ from the view taken of the law in the other case. The principal part of the argument for the plaintiff was founded on what may be called the carriage cases: *Laugher v. Pointer*, (5 B. & C. 547,) and *Quarman v. Burnett*, (6 M. & W. 499;) but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage, on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving and injury occurs to any one, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for a time. I have only to add, that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have based my judgment.¹

CURTIS v. KILEY.

(153 Mass. 123. — 1891.)

FIELD, C. J. As we understand the exceptions, there was evidence for the jury that the yard was under the general control of the defendants; that there was an entrance into, and a passageway across, the yard to the tenement occupied by Mrs. Lahey, which the jury might find the plaintiff was invited by the defendants to use; and that a trench had been dug either across

¹ *Wood v. Cobb*, 13 Allen, 58; *Huff v. Ford*, 126 Mass. 24; *Quinn v. Electric Co.*, 46 Fed. R. 506.

this passageway, or near to it, which rendered the passageway unsafe to those traveling upon it, unless proper guards were put up. The principal contention of the defendants is that as the work of digging the trench, and of laying drain-pipes in it, and of restoring the surface of the yard to its original condition was being done by one Condon, who was a competent person, and not a servant of the defendants, but an independent contractor, and as the defendants retained no control over the manner in which this work should be done, they are not responsible. We think that the case falls within the rule that, when the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner, by reason of the contract, is not relieved from the obligation of seeing that due care is used to protect such persons. The owner cannot continue to hold out the invitation without being bound to exercise due care in keeping the premises reasonably safe for use according to the invitation. (*Stewart v. Putnam*, 127 Mass. 403; *Sturges v. Society*, 130 Mass. 415; *Woodman v. Railroad Co.*, 149 Mass. 335.)

*Exceptions overruled.*¹

PALMERI v. MANHATTAN RY. CO.

(133 N. Y. 261. — 1892.)

GRAY, J. Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police officers, of a person in the railroad station, whom he suspected of being a counterfeiter, and the company was

¹ A provision in the contract that the owner's engineer shall supervise and approve daily the work of the contractors does not make them his servants. (*Casement v. Brown*, 148 U. S. 615.) The liability of a municipal corporation for the negligence of an independent contractor is considered carefully in *City of Birmingham v. McCary*, 4 So. 630; 38 A. L. J. 208. (Ala. 1888), cf., *Herrington v. Lansingburgh*, 110 N. Y. 145; 17 N. E. 728; 17 N. Y. S. R. 92; 38 A. L. J. 123, with *Pettengill v. Yonkers*, 116 N. Y. 558; 22 N. E. 1095; 27 N. Y. S. R. 531.

thereafter sued for false imprisonment. In that case the facts were, briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. Upon a certain occasion two men came into the station, and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police, and thought the bill looked "queer," but nevertheless took it, and gave back the change with the tickets, saying nothing to them. He then sent for a police officer, to whom he pointed out the men, who were then on the station platform. The bill was subsequently pronounced to be genuine, and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interest, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine; and, when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employers or his employment required of him. I refer to the case of *Mulligan v. Railway Co.*, 129 N. Y. 506. In the present case, however, the acts of the ticket agent were of a different character. The plaintiff purchased a ticket of the agent at the elevated railroad station, and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money, and demanded another quarter in place of the one given him. She insisted upon her money being genuine, and refused to give another quarter or to hand back the change. He became angry, and called her a counterfeiter and a common prostitute. He placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and to search

her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages because of injury sustained from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words, publicly spoken, concerning her. The jury believed her story, and the judgment which she has recovered the appellant seeks to avoid principally upon the ground that the ticket agent was acting outside of the scope of his employment in doing the acts complained of. The appeal must fail. This is not like the *Mulligan Case*. Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business intrusted to him the carrier becomes civilly liable, if its passengers or strangers receive injury therefrom. The good faith and motives of the servant are not a defence, if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases, of which *Weed v. Railroad Co.*, 17 N. Y. 362; *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Stewart v. Railroad Co.*, 90 N. Y. 588; and *Dwinelle v. Railroad Co.*, 120 N. Y. 117, are sufficient instances.

What materially distinguishes the present from the *Mulligan Case* is that there the servant of the company was not acting for the protection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community, by procuring the arrest of criminals whom he

knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business, whereas here the ticket agent clearly was engaged about the company's affairs, but, in the belief of the jury, unlawfully detained the plaintiff, and insulted her by slandering her character. It is needless to consider the case of *Mali v. Lord*, 39 N. Y. 381, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched upon suspicion of a theft, and whose general employment could not warrant such an act, and the present case, of an agent who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insults are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed. Judge Andrews, in *Rounds v. Railroad Co.*, 64 N. Y. 129, points out the distinguishing principle of these cases, and refers to *Mali v. Lord* in the course of his opinion. . . .

The judgment should be affirmed, with costs.

All concur.

JOHNSON v. LINDSAY.

(1891. — Appeal Cases 371.)

ACTION for damages in respect of personal injury caused by the negligence of defendant's workmen. Defence that plaintiff was a fellow servant with such workmen.

Plaintiff was engaged and paid by Higgs & Hill who were contractors for building a block of dwellings, and at the time of the injury was clearing away rubbish pursuant to their orders. Defendant's workmen were engaged and paid by them, and neither they nor their workmen received nor were bound to receive directions from Higgs & Hill, nor to submit to their control. They had no contract with Higgs & Hill, but contracted directly with the owner for their work, which consisted of fire-

proof flats and floors of concrete for laundry purposes in said dwellings, to be completed with "Lindsay" system. Their workmen were raising buckets of concrete to the topmost story, in performance of this contract, when through the negligence of such workmen a bucket fell upon and injured the plaintiff.

At the trial the jury found a verdict for £52, 10s, which was set aside by the Queen's Bench Division on the ground that plaintiff and defendant's workmen were engaged in a common employment, and this judgment was affirmed by the Court of Appeal. (23 Q. B. D. 508.)

LORD HERSHELL. The only other facts necessary to be stated are that there were, as far as appears, no communications between Higgs & Hill and Lindsay & Co. before the latter commenced their work, and that it was the architect who advised them that the buildings were sufficiently advanced to enable them to commence the work for which they had given him an estimate. It should be added that the payments were made to Lindsay & Co. through Higgs & Hill, and that at the time when the accident happened the appellant was not engaged about the work included in Lindsay & Co.'s contract. Upon this state of facts it is, I think, clear that the appellant was in no sense the servant of Lindsay & Co. It follows, therefore, that if it is essential to the defence of common employment that the person suing should himself be the servant of the master by whose servants' negligence the injury has been caused, the defence cannot be sustained in the present case. And upon a review of the authorities, I am unable to entertain any doubt that this is essential. Lord Cranworth, in delivering his opinion in this house, in the case of the *Bartonshill Coal Company v. Reid*, 3 Macq. 266, 295, thus states the rule established in this country: "When several workmen engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks." The law is laid down in substantially the same terms by Lord Blackburn in *Howells v. Landore Steel Company*, Law Rep. 10 Q. B. 62, and Lord Chief Justice Erle in *Hall v. Johnson*, 3 H. & C., at p. 595, who, in delivering

the judgment of the Exchequer Chamber, said: "The case falls within the principle established, not only in this country but also in Scotland, Ireland, and America, that a servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service including negligence on the part of a fellow servant, when he is acting in the discharge of his duty as a servant of him who is the common master of both." And in the recent case of *Swainson v. North Eastern Railway Company*, 3 Ex. D., at pp. 348, 349, Lord Bramwell said: "We must consider what obligation a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damages from the negligence of a fellow servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury." The present master of the rolls in the same case thus expressed himself: "I think that the authorities bear out the proposition laid down in the Exchequer Division, that in order to give rise to the exemption there must be a common employment and a common master. It is not necessary that there should be a common service for a definite time or at fixed wages, for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment. A volunteer puts himself under the control of another person and in respect of that other person he is for the time being in the position of a servant."

These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service, the defence of common employment is not open to him. Such service need not, of course, be permanent or for any defined term. The general servant of A may for a time or on a particular occasion be the servant of B, and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such.

This, as has been pointed out, is the position of a volunteer. But it is obvious that if the exemption results as it does according to the authorities I have cited, from the injured person having undertaken, as between himself and the person he serves, to bear the risks of his fellow servant's negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied. There are other considerations which point in the same direction. It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servants' negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties. The language used by Lord Cairns in *Wilson v. Merry*, Law Rep. 1 H. L. Sc. 326, 331, 332, was much pressed upon your Lordships. It appears to have been supposed to countenance a wider exemption than is to be deduced from the other authorities to which I have referred. Lord Cairns, in delivering his opinion in the House, said: "I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense the fellow workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow workman; but the case of the fellow workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand on higher and broader grounds." But it is clear to my mind that when Lord Cairns used this language he was only intending to repudiate the contention put forward by the appellant in that case, that the rule applied exclusively to workmen of the same grade actually employed in a common labor, and had no application where the person whose negligence was complained of was in the position of a manager not

taking part in manual labor, who was in fact the employer's *alter ego*. Other passages in the noble and learned Lord's opinion indicate, I think clearly, that he did not intend to state the law differently from Lord Cranworth, whose opinion in the *Bartonshill Coal Company v. Reid*, 3 Macq. 266, he quotes with approval.

It is said however that the case of *Wiggett v. Fox*, 11 Ex. 832, is decisive in favor of the respondents, and this view was adopted in the courts below. With deference to the learned judges who have entertained this view, I am quite unable to concur in it. If the law there laid down would determine the present case in favor of the respondents, I should feel bound to reject it as inconsistent with all the other English authorities. The plaintiff in *Wiggett v. Fox*, 11 Ex. 832, was the administratrix of a servant of a sub-contractor who had been employed by the defendants to do a part of the work included in their contract. It was held that he was a fellow servant of the servant of the defendants whose negligence caused him injury; that the sub-contractor and his servants had become the servants of the contractor. The ground of this decision was explained by Baron Channell in *Abraham v. Reynolds*, 5 H. & N. 143, 150, to be that it was proved that the deceased was paid by the defendants and that the defendants had a control over and power to dismiss the deceased, though engaged by the sub-contractor. It is unnecessary to consider whether the view of the facts was correct, though the propriety of the decision has been more than once doubted, and notably by Lord Chief Justice Cockburn in *Rourke v. White Moss Colliery Company*, 2 C. P. D. 205, 208; for a decision resting on such a view of the facts can, as it seems to me, have no application to the present case. In the first place, I do not think that Lindsay & Co. were sub-contractors under Higgs & Hill; I think they had an independent contract with those who were employing Higgs & Hill. In the second place even if they are to be regarded as in some sense sub-contractors under Higgs & Hill, I think it is impossible to say that the servants of Higgs & Hill were the servants of Lindsay & Co., or that they had put themselves under the control of Lindsay & Co., to act as their servants, or were in any way acting as such at the time of the accident. It only remains for me to notice the recent Scotch decision in the case of *Woodhead v. Gartness*

Mineral Company, 4 Sc. Sess. Cas., 4th series, 469, which was naturally much relied on by the respondents. Lord Justice Lopes stated in the court below, I think quite correctly, that the decision carried the principle of common employment much further than was warranted by any of the English authorities. And it appears to me to be a development of the doctrine which is really in antagonism with cases which have been decided in this country. It eliminates altogether the element that the injured man and the man doing the injury must be in the employ of a common master, and treats as unimportant that which I consider to be of the essence of the exemption, that is to say, the mutual undertaking between the employer and employed to be implied from the relationship of master and servant constituted between them. I think the judgment appealed from ought to be reversed and the judgment entered for the plaintiff restored, and I so move your Lordships.

THE PETREL.

(Law Reports, Probate Division, 320. — 1893.)

The President (SIR FRANCIS H. JEUNE). On January 5, 1893, the *Petrel* came into collision with the *Cormorant* and the *Cormorant* was sunk. The owners of both vessels are the General Steam Navigation Company. It is admitted that the collision was caused by the negligence of those navigating the *Petrel*, and it is proposed to pay into court the sum for which the owners of the *Petrel* are liable. The first question is whether the master, officers and crew of the *Cormorant* can claim against this fund in respect to their effects lost in that vessel. It is said that they cannot, by reason of their common employment with the master, officers, and crew of the *Petrel*.

No doubt the captain and crew of the *Cormorant* had a common master with the captain and crew of the *Petrel*; but were they in common employment with each other? It is remarkable that although propositions of law defining common employment and recognizing its limitations have more than once been laid down, and have been illustrated by instances in which

common employment has been held to exist, there appears to be no decided case in the English courts (there are several in the Scotch courts) in which upon consideration of the tests of it, common employment has been negatived. The general principles of the law of common employment were fully laid down in the first case on the subject, *Priestly v. Fowler*, 3 M. & W. 1, in 1837. But I think that the most complete exposition of what constitutes common employment is to be found in the great judgment of Shaw, C. J., of Massachusetts, in *Farwell v. Boston Railroad Corporation*, 4 Metcalf, 49, quoted at length in 3 Macq. H. L. C. 316, which, no doubt, materially influenced the House of Lords in the case of *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. C. 266, in which, reversing the decision of the Court of Session, their Lordships held that a miner laboring in a mine was in common employment with the engine-driver by whom the cage was worked. Two phrases of Shaw, C. J., indicate his view of the test of common employment. One lays down that he who engages in the employment of another for the performance of specified services "takes upon himself the natural risks and perils incident to the performance of such services," and the other refers to the condition of the safety of each servant depending much on the care and skill with which each shall perform his appropriate duty. This view was adopted by Blackburn, J., in a judgment affirmed by the Exchequer Chamber (*Morgan v. Vale of Neath Ry. Co.*, 5 B. & S. 570, at p. 580; Law Rep., 1 Q. B. 149) in these words: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks, which are to be considered in his wages." On this principle, it having been previously decided in *Hutchinson v. York, etc., Ry.*

Co., 5 Ex. 343, that the engine-driver of a train and a servant of the company carried in the train were in common employment, it was held that a carpenter repairing a turntable was in common employment with shunters working traffic in connection with it. The view of Shaw, C. J., appears again to have been followed in *Lovell v. Howell*, 1 C. P. D. 161, in which the principle approved was that the servant accepts the ordinary risk incident to his service. The principle of safety being dependent "in the ordinary and natural course of things" on the skill and care of the fellow-servant, and of "risk of injury being a natural and necessary consequence" of his want of skill or care, is consistent with, though perhaps more exact than, the test suggested by Lord Chelmsford in the case of the *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. C. 300, at p. 307, from the negative point of view, that common employment does not exist when injury happens to the servant "on occasions foreign to his employment," or to servants engaged "in different departments of duty."

It was suggested in argument before me with reference to the case of *Charles v. Taylor*, 3 C. P. D. 492, that the physical contiguity of the employments constitutes a test. But, as Shaw, C. J., points out, this does not afford a distinction on which a practical rule can be established. In all cases the immediate instrument of physical injury must be contiguous to the person injured. And in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle range is clearly in common employment with the marker at the other, when the two have a common master; and, to give a stronger instance, a servant who unskillfully packs dynamite in a factory, and another who in unpacking it at a distant warehouse is injured by its explosion, are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with common employment. I doubt, also, if "one common object" — the phrase emphasized by Bramwell, B., in *Waller v. South Eastern Ry. Co.*, 2 H. & C. 102, at p. 112, supplies an exact criterion. As Blackburn, J., points out, there may be common employment, though the immediate object of the labor of the two servants be very different, and if the common object be

remote, such as that of making money for the employer (the sole nexus of employment suggested as existing between the two captains in this case), there may be no common employment. If a person carried on the occupation of a banker and brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment. I think, therefore, that probably no more complete definition can be formulated than is afforded by the language of Blackburn, J. The consideration that the risk of injury to the one servant is a natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things, dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might be perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock and the safety of each thus became, in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the Co. than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think therefore that these two captains were not in common employment.¹

¹ Cf. *Van Avery v. Ry. Co.*, 35 Fed. R. 40.

CHAPTER IV.

EXCEPTIONS, SECTION 2. JUDICIAL ACTS.

GROVE v. VAN DUYN.

(44 N. J. L. 634. — 1882.)

THIS was an action for trespass for assault and unlawful imprisonment. The defendant, Cornelius Van Duyn, pleaded the general issue of not guilty to the declaration, which was in its usual form in trespass, for assault and unlawful imprisonment.

The defendant, Charles L. Stout, also pleaded the general issue to the said declaration, and gave the notice of special matter in evidence under said plea, setting up that he was one of the justices of the peace of the county of Middlesex, and that upon the sworn complaint of Cornelius Van Duyn, he issued his warrant in the ordinary form, directing the persons named in the complaint to be brought before him to answer; and such three persons having been arrested by a constable, on such warrant, and being brought before said justice, and having waived an examination, were by him committed to the jail of the county for the cause mentioned in the complaint, to await the action of the next grand jury. Having given bail the next day the persons so arrested were discharged, and thereupon one of them, William H. Grove, Jr., brought this suit in trespass for the above mentioned imprisonment. At the trial the plaintiff was nonsuited, and to review that judgment this writ of error was brought.

For the plaintiff in error, *A. V. Schenck* and *E. T. Green*.

For the defendants in error, *J. H. Stewart*.

The opinion of the court was delivered by

BEASLEY, Ch. J. Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, or of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this State in its fullest extent, has been repeatedly declared by our own courts. Such was pronounced by the Supreme Court to be the admitted principle in the case of *Little v. Moore*, 1 South. 75; *Taylor v. Doremus*, 1 Harr. 473; *Mangold v. Thorpe*, 4 Vroom, 134; and by this court in *Loftus v. Fraz*, 14 Vroom, 667. To this extent there is no uncertainty or difficulty whatever in the subject.

But the embarrassment arises where an attempt is made to express with perfect definiteness when it is, that acts done by a judge and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made.

It is said everywhere in the text-books and decisions, that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be "the authority of the law to act officially in the particular matter in hand." (Cooley on Torts, 417.) But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that

they leave out of the account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction according to the definition just given, over "the particular matter in hand," and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him, he is answerable in an action for the injury that has ensued. But I think these cases are deflections from the correct rule, they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case; if the superior court in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability, is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. As an example, we may refer to the old case of *Gwynne v. Poole*, 2 Lutw. 387, in which it was held that the justice was justified because he had reason to *believe* that he had jurisdiction, although there was an arrest in an action which arose out of the justice's jurisdiction. This case has been since approved in

Kemp v. Neville, 10 C. B. (N. S.) 550. Here, if the test of official liability had been the mere fact of the right to take cognizance over the particular matter in hand, considered in the light of strict legal rules, this decision would have been the opposite of what it is. In the same way the subject is elucidated in *Brittain v. Kinnard*, 1 B. & B. 432, the facts being a conviction by a justice of a person of having gunpowder in a certain *boat*, a special act authorizing the detention of any suspected *boat*; and when the magistrate was sued in trespass for an illegal conviction, it was declared that the plaintiff, in order to show the defendant's want of cognizance over the proceedings leading to the conviction, could not give evidence that the craft in question was a vessel and not a boat, because the justice had judicially determined that point. And in this case likewise, the test of jurisdiction in the magistrate in point of fact and of law, was rejected; an inquiry into the authority, by force of which the proceedings had been taken, being disallowed for the reason that such question had been passed by the magistrate himself, the point being before him for adjudication. The same doctrine was promulgated in explicit and forcible terms by Mr. Justice Field, delivering the opinion of the Supreme Court of the United States, in the case of *Bradley v. Fisher*, 13 Wall. 335, this being his language: "If a judge of criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which it is not, and proceed to the arrest and trial of a party charged with such act, . . . no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him; for these are particulars for his judicial consideration, whenever this general jurisdiction over the subject matter is invoked."

These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to, but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely

made, that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature, must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this State, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequence to the defendant proceeding from their judgment. As I have said, in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

Nevertheless, it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge, will impose upon him a liability to an action in favor of the person who has been injured by such excess. If the magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an illegal larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offences, for the conclusive reply would be, that particular case was not, by any form of proceeding, put under his authority.

From these legal conditions of the subject my inference is, that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at *least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to a person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

The application of the above-stated rule to this case must, obviously, result in a judgment affirming the decision of the Circuit Judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were, that the plaintiff, in combination with two other persons, "with force and arms," entered upon certain lands, and "with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value," etc., and were engaged in carrying other cornstalks from said lands. By a statute of this State (Rev. p. 244, Sec. 99), it is declared to be an indictable offence, "if any person shall wilfully, unlawfully and maliciously" set fire to or burn, *carry off* or destroy any barrack, cock, crib, rick or stack of hay, *corn*, wheat, rye, barley, oats or grain of any kind, or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is

not the misconduct described in this act, nevertheless the question of their identity was *colorably* before the magistrate, and it was his duty to decide it; and under the rule above formulated, he is not answerable to the person injured for his erroneous application of the law to the case that was before him.

As to the other defendant, all he did was to make his complaint on oath before the justice, setting forth the facts truly, and for such an act he could not be held liable for the judicial action which ensued, even if such action had been extra-judicial. But as the case was, as we have seen, brought within the jurisdiction of the judicial officer, neither this defendant, nor any other person could be treated as a trespasser for his co-operation in procuring a decision and commitment which were valid in law, until they had been set aside by a superior tribunal.¹

Let the judgment be affirmed.

EXCEPTIONS, SECTION 3. EXECUTIVE ACTS.

CORNELL v. BARNES.

(7 HILL, 35. — 1844.)

ON error to the Columbia common pleas. Barnes brought an action against Richard Cornell and three others in a justice's court, and declared as follows: "The plaintiff complains against the defendants for that heretofore, to wit, in the spring of 1840, Richard Cornell was duly elected a constable of the town of Chatham, in the county of Columbia; and afterwards, to wit, etc., and previous to his entering upon the discharge of the duties of said office, etc., the said Cornell,

¹ Cf. *Vaughn v. Congdon*, 58 Vt. 111; 48 Am. R. 758, when complaint showed on its face that the offence was barred by the Statute of Limitations, and justice held liable; but see dissenting opinion. Also *Lange v. Benedict*, 73 N. Y. 12; 29 Am. R. 80, and criticism in 15 Am. L. Rev. 441. Writ of error in this case dismissed (99 U. S. 68), because it presented no Federal question. Its doctrine applied to arbitrators in *Jones v. Brown*, 54 Ia. 74. See *Austin v. Vrooman*, 44 A. L. J. 424, 128 N. Y. 229.

and the other defendants above named, as his sureties, did, by their writing, jointly and severally agree to pay to each and every person who should be entitled thereto, all such sums of money, as the said constable might become liable to pay on account of any execution delivered to him for collection; and afterwards, to wit, etc., an execution was issued on a judgment rendered before John Trimper, esquire, then and now one of the justices of the peace of said county, in favor of the said plaintiff against James Walker, a resident of the town of Chatham in said county, on a promissory note, for \$26.71, damages and costs, which said execution was delivered to the said Cornell, constable as aforesaid, to be by him executed according to law; yet the said Cornell wholly neglected to collect and execute said execution as therein directed, and wholly neglected to make return of the same within the time limited by law; whereby he, the said Cornell and his sureties, become liable to pay to the said plaintiff the amount of said execution, with interest, etc.," but have not paid, etc. The defendants demurred to the declaration, assigning for cause, among other things, that it did not set forth enough to show jurisdiction on the part of the justice who rendered the alleged judgment, either in respect to the person or the subject matter. The plaintiff joined in demurrer, and the justice gave judgment in his favor; whereupon the defendant appealed to the common pleas. The latter court affirmed the judgment of the justice, and the defendants sued out a writ of error.

G. W. Bulkley for the plaintiffs in error.

C. P. Schermerhorn for the defendant in error.

By the court. BEARDSLEY, J. In order to maintain this suit, the plaintiff was bound to show that the constable had become liable to pay the whole or some part of the money for which the execution was issued. Such are the precise terms of the instrument executed by the defendants, and so is the statute on the subject. (1 R. S. 346, § 21.) A constable may serve an execution which is regular on its face, although issued upon a judgment rendered without jurisdiction; for he may

rely upon his process, and is not bound to see that jurisdiction has been acquired. But although such is the right of the officer, he is under no legal obligation to serve the process; and its invalidity is always a good answer to an action brought against him for refusing to execute it. (*Earl v. Camp*, 16 Wend. 567-8, and the cases there cited.)

Process from a court of special and limited authority cannot be deemed valid in favor of the party who procured it to be issued, until it is shown that complete jurisdiction existed. Hence to make out a right of action in the present case, the plaintiff was bound to show that the justice who rendered the judgment on which the execution issued, had jurisdiction of the subject matter, and of the person of the defendant. The declaration shows that the justice had jurisdiction of the subject matter, for it alleges that the action was brought to recover the amount of a promissory note; but it fails to show that jurisdiction over the person had been acquired. For this purpose it was necessary to aver either that the party appeared, or that process was sued out and duly served on him. The declaration contains no averment of this nature, and the judgment of the court below should be reversed.

Judgment reversed.

O'SHAUGHNESSY v. BAXTER.

(121 Mass. 515. — 1877.)

L. M. Child for the plaintiff.

J. Bennett for the defendant.

GRAY, Ch. J. This is an action of tort against a constable of Boston for an assault and false imprisonment. The material facts of the case, as they appear from the statements in the report and the findings of the jury, are as follows: This plaintiff, whose real name is John O'Shaughnessy, was sued by the name of John Shaughnessy, a name by which he was commonly known, upon a promissory note signed by another person of that name, and not by himself. The person who

made the writ knew that the plaintiff was not the person who signed the note, but intended to have the writ served upon him, and it was served upon him by another constable, and entered in the court having jurisdiction thereof, which rendered judgment, upon his default, for the plaintiff in that action, and issued execution accordingly, in due form of law. The execution, with the proper certificates, was delivered to this defendant, with instructions to take this plaintiff and commit him to jail. The defendant did so, in obedience to such instructions, and in good faith, after ascertaining that the original writ had been served upon the plaintiff, but knowing that he was not the person who signed the note upon which the action was brought.

On this state of facts, the plaintiff, being the party against whom the writ was intended to be made, and on whom it was actually served, was the party defendant therein, and the person against whom the judgment was rendered, and the execution issued. Whatever remedies he might have to relieve him from the judgment and execution as obtained by fraud, or to recover damages against the person who fraudulently abused the process of the court, the officer, acting in good faith, had the right to rely for his protection upon the process put into his hands, and was not bound to go behind that process, and to assume the risk of determining the question whether the plaintiff really signed the note upon which the action was brought, or the truth of any extrinsic fact which would exempt him from being arrested or imprisoned upon the execution. (*Laroche v. Wasbrough*, 2 T. R. 737, 739; *Magnay v. Burt*, 5 Q. B. 381; *S. C. Dav. & Meriv.* 652; *Wilmarth v. Burt*, 7 Met. 257; *Twitchell v. Shaw*, 10 Cush. 46; *Underwood v. Robinson*, 106 Mass. 296, and other cases here cited.) In the words of Chief Justice Parker, "The difficulty in such cases is, to ascertain whether the judgment was or was not, in fact, rendered against the person who is taken in execution; for if it was, although the person was mistaken, yet the officer would be justified." (*Hallowell & Augusta Bank v. Howard*, 14 Mass. 181, 183.)

The fact that this plaintiff was commonly known by the name by which he was sued and arrested, distinguishes the

case from those in which one man has been arrested upon a writ against another of a different name. (See *Cole v. Hindson*, 6 T. R. 234; *Finch v. Cocken*, 5 Tyrwh. 774, 785; *S. C.* 3 Dowl. 678, 686; *Griswold v. Sedgwick*, 1 Wend. 126, 132; *Langmaid v. Puffer*, 7 Gray, 378.)

Judgment on the verdict for the defendant.

EXCEPTIONS, SECTION 4. QUASI JUDICIAL ACTS.

STEWART ET AL. v. SOUTHARD.

(17 Ohio, 402. — 1848.)

THE original action was case. In the declaration Southard avers that he was resident, etc., of school district No. 1, in the township of Paint, in which a common school was taught; that he had sons and daughters of the proper age which he was desirous to have taught at said school; that the defendants (now plaintiffs in error), at the time, etc., were school directors of said district, and contriving, etc., to deprive him of the benefit of having his said children educated, etc., at said district school, wrongfully admitted certain colored children into said school, whereby he was deprived of the benefit and advantages of having his children taught at the same, and has been put to great trouble and expense in procuring them to be taught and educated.

To this declaration the defendant demurred.

His attorney adds to the demurrer this: "all objection to form and substance waived. The only question to be raised to be the constitutionality of the school law." The court of common pleas overruled the demurrer. The defendant plead the general issue. The cause was submitted to the court and judgment rendered for the plaintiff for twenty-five dollars. Two errors are assigned —

1st. That the declaration is insufficient.

2d. That judgment was given for plaintiff when it should have been given for defendants.

Robert Robinson and J. H. Thompson for plaintiffs in error.

J. L. Green, Thurman & Sherer for defendant in error.

BIRCHARD, Ch. J. This is in the nature of an action for misbehavior of a public officer in the discharge of his duty. The acts complained of are not charged to have been done either wilfully or maliciously. The most that can be made of the averments of the declaration when tried upon a demurrer is, that the plaintiffs in error, while acting in their corporate capacities as directors of a school district, misjudged the law and acted erroneously. "There is no instance of an action of this sort maintained, for an act arising merely from an error of judgment." (*Harman v. Tappender*, 1 East's Rep. 555.) In *Ramsey v. Riley*, 13 Ohio Rep. 157, this court held that an officer acting within the scope of his duty is only responsible for an injury resulting from a corrupt motive. These principles are clearly applicable and must be conclusive of the merits of this declaration, unless we should depart from them. We are not induced to do so unless required by the authority of our own decisions.

The case of *Lane v. Baker*, 12 Ohio Rep. 238, is presented as a decision directly in point, as opposed to the rule above stated. The only thing decided in that case was, that youth of more than half white blood are entitled to the benefit of the common school fund. No question seems to have been raised touching the sufficiency of the declaration, and had there been, we think that after verdict (the state in which the question was presented) that declaration would have been held sufficient. This declaration, under our statute, is to be tried on demurrer. The difference between testing the sufficiency of a declaration on demurrer, or after verdict, is too distinct to need remark. On demurrer, the intendment is against the pleader. After verdict it is in support of the pleading. So that in the latter case a good title defectively set forth is cured. In *Lane v. Baker*, the declaration avers a clear right in Lane to send his children to the school, avers it was supported by the common school fund, that he sent his children, who were white, to the school, and that the directors, well knowing the premises and contriving and wrongfully intending to injure him, and to deprive him of his just rights,

turned said children out of said school. I concurred in that decision, and have always thought it went far enough and should not be extended. It is true the special verdict, in that case, does not find a corrupt motive or malice, but as said above, the object of taking it in that form was to present the simple question whether a child more white than black was entitled to share in the common school fund, and in point of fact no other question was discussed and decided in that case. But, by this remark, we do not mean to question or cause doubts of the correctness of the decision in *Lane v. Baker*, for there is a distinction between turning a scholar out of school who has a just right to be there, and thus inflicting a positive injury, by depriving him of a privilege which ought to be regarded inestimable, and admitting erroneously into the school such scholars as may possibly render this privilege less desirable. The one is a positive denial of a right, the other is an act which possibly may annoy one in the exercise of a right. The one is an injury which is tangible and can be measured, the other is a different character. A distinction akin to this was taken in *Jeffries v. Ankeny et al.*, 11 Ohio Rep. 374, in which, although the doctrine of general immunity of trustees of townships, when acting without a corrupt motive, is fully recognized, as a general rule, yet they were there held liable for erroneously refusing a lawful vote without proof of malice, upon the ground that the law afforded no other adequate remedy — that necessity demanded it. It would hardly follow, from the fact that Jeffries was allowed to maintain his action for the erroneous refusal of the trustees to receive his vote, that he would be entitled to maintain an action against a board of trustees who should erroneously receive the vote of an alien, whereby his vote was neutralized. Much less, if in consequence of the alien's voting he should stay away from the polls and refuse to vote, would he be allowed to sue and aver that thereby he was deprived of the elective franchise.

Still, this last supposed case of Jeffries would not be more novel than this action brought by Southard. That would be a case of first impression, and so is this. That, in principle, would be unlike anything before known, and so is this, for in principle they are alike. If an action could be maintained

against the trustees of townships by any voter who would refuse voting merely because they had erroneously received the votes of aliens, or if one could be maintained against school directors by any person who withdraws his children in consequence of an error committed through conscientious and mistaken notions of duty, or through ignorance, it is easy to foresee that it would be difficult to procure men to accept such offices. The danger of being annoyed or perhaps ruined by vexatious prosecutions would be too great to justify a prudent man in hazarding the risk. Were we to take a stride beyond the cases of *Jeffries v. Ankney*, and of *Lane v. Baker*, strong enough to sustain such action, we should place it in the power of captious persons to break up probably three-fourths of the schools in the State. If suit may be maintained for an error in admitting colored children (and we think it was probably wrong), it must be on a principle that will enable every member of the school district to maintain an action for the same, or for any other mistake in the discharge of their duties. No necessity demands the establishing of such a principle.¹

Judgment reversed and demurrer sustained.

WASSON v. MITCHELL.

(18 Ia. 153. — 1864.)

DEMURRER to petition. The defendants constituted the board of supervisors of Polk county in 1861. The petition alleges that, as such board, the defendants, at their regular meeting in January, 1861, “*carelessly and negligently required, accepted and approved* the official bond of one H. H. Helton

¹ Election officers perform ministerial and not judicial functions, unless the latter are conferred by a statute. In New York their functions are purely ministerial. (*People ex rel. Stapleton v. Bell et al.*, 119 N. Y. 175, following Dwight, C. in *Goetchus v. Matthewson*, 61 N. Y. 420, whose opinion contains an exhaustive and valuable discussion of the subject.)

The liability of club officers for the expulsion of members is considered in *People ex rel. Deverell v. Musical M. P. U.*, 118 N. Y. 101.

as constable for the township of Des Moines, in Polk county, given for the year 1861, said bond not being such as was reasonable and necessary for the faithful discharge by the said Helton of his official duties, nor such as was required by law, for that the said bond did not have any sureties thereon, the names of 'A. N. Marsh' and 'C. C. Van' *having been forged* thereto, they never having signed the said bond or authorized their names to be placed thereon." "That the said A. N. Marsh was notoriously insolvent at the time, and known to be so by the defendants." The petitioner then alleges his injury in this: that Helton collected money for him on execution, converted the same to his own use and died insolvent; that Marsh has absconded, and that in an action by the plaintiff against said C. C. Van on said bond, the latter was adjudged not liable thereon, because his name had been forged thereto. The defendants demurred to the petition because they were not personally liable for acts done in their official capacity; that no cause of action was stated against them, etc.

Demurrer sustained, and the plaintiff appeals.

J. F. Seeley for the appellant.

John Mitchell for appellees.

DILLON, J. The allegations of the petition are not as precise and clear as they ought to be, when questioned by demurrer. Upon a fair construction, the petition may be taken to allege, in substance, that the names of both sureties on the official bond of Helton, as constable, were forged, and that the defendants approved of it, carelessly and negligently, that is, the defendants would have known of the forgery, had it not been for their neglect or want of care. And it is also alleged, that one of the persons whose names appeared on the bond as surety was notoriously insolvent, and known to be so by the defendants, when they approved the bond. Upon the assumption that this is the true construction of the petition, we place our decision.

The statute is imperative in requiring that the official bond

of a constable "shall be given with at least two sureties," and in requiring that these sureties shall be freeholders. (Rev. §§ 558, 592.) "The surety in every bond," it is further provided, "must be a resident of the State, worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this State equal to the sum to be secured. Where there are two or more sureties in the same bond, they must, in the aggregate, have the qualifications prescribed in this section." (Rev. § 4126.) Constables must give bonds in the penal sum, to be fixed by the board of supervisors, by an order of record. (Rev. § 557.) This board has power to require constables "to give such bonds and additional bonds as shall be reasonable or necessary for the faithful performance of their several duties;" and may remove any county officer who neglects or refuses to give such bond. (Rev. § 312, cl. 10.) And the board are charged by law with the duty of approving the bonds of constables. (Rev. § 560.) These various provisions evince the care and solicitude of the legislature to protect the public by requiring ample and sufficient bonds from public officers. How useless these provisions, and how unavailing these intended safeguards, if the approving board or officer could, under no circumstances and in no possible event, be held liable for omission or neglect of duty.

As to the general rules of the law, there is no great dispute. Thus, a judicial officer is not liable civilly for judicial acts, unless it may be (a point on which the authorities are not in accord) where he acts wilfully, maliciously or corruptly. (Several authorities cited.) And these authorities show that this exemption from civil responsibility extends to all public officers who are charged with deciding upon matters of a *quasi* judicial nature; and we have no doubt that it extends, in general, to a body, such as the board of supervisors, under our statute. The ground of this exemption is that the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others "to act upon their own free, unbiased convictions, uninfluenced by any apprehensions."

On the other hand, the rule is equally well settled, that, for the misfeasance or nonfeasance of a ministerial officer, the party injured may have redress by civil action. This broad

distinction between judicial and ministerial acts, however plain in theory, is, in many cases, very difficult of application. Thus, is the act of approving of a bond judicial or ministerial? The only way to reconcile the cases is to hold that it may be either; depending, perhaps, upon the general nature of the duties of approving officer. For example, it is "a well-settled rule of American law and practice, that an action lies against a sheriff for taking insufficient bail." (2 Hild. on Torts, 276, § 4, and cases cited.) But it is held that a justice of the peace is not liable who acts in good faith for misdeciding that a married woman is competent to contract and sign a bond as surety (*Howe v. Mason*, 14 Iowa, 510), or for error of judgment; there being no intentional fault in taking a recognizance to prosecute an appeal in a form not authorized by law, and therefore, invalid — the proper form having been rendered by the course of legislation, a difficult and perplexing question. (*Chickering v. Robinson*, 3 Cush. 543.)

We would not hold the board of supervisors to be absolute guarantors of the genuineness of the signatures to official bonds. They may, in the course of business, refer such matters to a committee, to examine and report. It is only necessary that they or their committee shall act in good faith, and with reasonable care and prudence. If, in the fair exercise of their judgment, they are of opinion that the sureties on a bond are solvent, they are not civilly liable if they should be mistaken; but would be thus liable if they approved a bond whose sureties were known to them to be worthless. So they would have no right to approve a bond without any sureties whatever. Such an act, knowingly or carelessly done, could not be regarded as a judicial act, in such a sense as to exempt them from civil liabilities to any person thereby injured. (*Smith v. Trawl*, 1 Root (Conn.) 165; with which *Phelps v. Sill*, 1 Day, is not inconsistent.) Without extending our remarks, we may observe that this court has given the subject much consideration; and we believe this to be the true rule, viz.: exempting the board of supervisors, in the approval of bonds, from honest mistake and errors of judgment, whether of law or fact, but holding them at the same time personally liable for negligence, carelessness and official misconduct such as are

alleged in the petition. This rule is the only one which will protect the public, and at the same time occasion no interest or embarrassment of which a conscientious and faithful public officer will or can justly complain. If the plaintiff can establish the allegations of his petition, we are of the opinion that he ought to recover; wherefore the judgment of the District Court sustaining the demurrer thereto is

Reversed.

EXCEPTIONS, SECTION 7. AUTHORIZED ACTS.

B. & P. RY. CO. *v.* F. B. CHURCH.

(108 U. S. 317. — 1883.)

ACTION in the nature of an action on the case to recover damages for the discomfort occasioned by the establishment of a building for housing the locomotive engines of a railroad company, contiguous to a building used for Sunday-schools and public worship by a religious society.

Mr. Enoch Totten for the plaintiff in error.

Mr. R. T. Merrick and *Mr. J. J. Darlington* for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

If the facts are established which the evidence tended to prove, and from the verdict of the jury we must so infer, there can be no doubt of the right of the plaintiff to recover. The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. The hammering in the shop, the rumbling of the engines passing in and out of the engine house, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the chimneys, with its cinders, dust and offensive odors, created a constant disturbance of the religious exercises of the

church. The noise was often so great that the voice of the pastor while preaching could not be heard. The chimneys of the engine house being lower than the windows of the church, smoke and cinders sometimes entered the latter in such quantities as to cover the seats of the church with soot and soil the garments of the worshippers. Disagreeable odors, added to the noise, smoke and cinders, rendered the place not only uncomfortable but almost unendurable as a place of worship. As a consequence, the congregation decreased in numbers, and the Sunday-school was less numerously attended than previously.

Plainly the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday-school which assembled there on the Sabbath and on different evenings of the week. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. (*Crump v. Lambert*, L. R. 3 Eq. 409.)

The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing them, are not affected by their corporate character. Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie. Here the plaintiff, the Fifth Baptist Church, was incorporated that it might hold and use an edifice erected by it, as a place of public worship for its

members and those of similar faith meeting with them. Whatever prevents the comfortable use of the property for that purpose by the members of the corporation, or those who, by its permission, unite with them in the church, is a disturbance and annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted.

The liability of the defendant for the annoyance and discomfort caused is the same also as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted, that an action will not lie against a corporation for a tort, is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is so well settled as not to require the citation of any authorities in its support.

It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skilfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city.

Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.

But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church, to an extent rendering it uncomfortable as a place of worship. It admits indeed of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way that would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to

justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance.

The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil and criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large.

Thus, in *Sinnickson v. Johnson*, 2 Harr. N. J. at 151, it was held by the Supreme Court of New Jersey that an act of the legislature authorizing an individual to erect a dam across a navigable water constituted no defence to an action for damages for an overflow caused by the dam.

"It may be lawful," said the court, "for him (the grantee of the power) and his assignees to execute this act, so far as the public interests, the rights of navigation, fishing, etc., are concerned, and he may plead, and successfully plead, the act to any indictment for a nuisance, or against any complaint for an infringement of a public right, but cannot plead it as a justification for a private injury which may result from the execution of the statute."

In *Crittenden v. Wilson*, 5 Cow. 165, it was held by the Supreme Court of New York that an act authorizing one to build a dam, on his own land, upon a creek or river which was a public highway, merely protected him from indictment for a nuisance. If, said the court, there had been no express provision in the act for the payment of damages, the defendant would still have been liable to pay them, and the effect of the grant was merely to authorize the defendant to erect a dam, as he might have done, if the stream had been his own, without a grant. In such a case he would have been responsible in damages for all the injury occasioned by it to others.

In *Brown v. Cayuga &c. Railroad Company*, 12 N. Y. 486,

the company was sued for overflowing plaintiff's land by means of a cut through the banks of a stream which its road crossed. It pleaded authority by its charter to cross highways and streams, and that the cut in question was necessary to the construction and maintenance of the road. But it was held that the company was liable for damages caused.

"It would be a great stretch," said the court, "upon the language, and an unwarrantable imputation upon the wisdom and justice of the legislature, to hold that it imports an authority to cross the streams in such a manner as to be the cause of injury to others' adjoining property."

And so the court adjudged that the company was under the same obligation as a private owner of the land and stream, had he bridged it; and that the right granted to bridge the stream gave no immunity for damages which the excavation of its banks for that purpose might cause to others.

In *Commonwealth v. Kidder*, in the Supreme Court of Massachusetts, 107 Mass. 188, a statute of that State authorized the storage, keeping, manufacture and refining of crude petroleum or any of its products in detached and properly ventilated buildings, specially adapted to that purpose; and it was held that it did not justify the refining of petroleum at any place, where a necessary consequence of the manufacture was the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive nature.

Numerous other decisions from the courts of the several States might be cited in support of the position that the grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges.

If, as asserted by the defendant, the noise, smoke and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodelled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and if that be not possible, they should be removed to some other place where, by their use, the plaintiff would not

be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes.

There are many lawful and necessary occupations which by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime and the like. Their presence near one's dwelling-house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughter-houses, lime-kilns, tallow-furnaces are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct such an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business. (*Fish v. Dodge*, 4 Denio, 311.)

The fact that the smoke stacks of the engine house were as high as the city regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. In requiring that chimneys should have a certain height, the regulations did not prohibit their being made higher, nor could they release from liability if not made high enough. It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house. If any adjudication is wanted for a rule so obvious, it will be found in the cases of *Sampson v. Smith*, 8 Sim. 271, and *Whitney v. Bartholomew*, 21 Conn. 212.

The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated

in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure.

Judgment affirmed.

EXCEPTIONS, SECTION 8. INEVITABLE ACCIDENT.

BROWN v. COLLINS.

(53 N. H. 442. — 1873.)

TRESPASS, by Albert H. Brown against Lester Collins, to recover the value of a stone post on which was a street lamp, situated in front of his place of business in the village of Tilton. The post stood upon the plaintiff's land, but near the southerly line of the main highway leading through the village and within four feet of said line. There was nothing to indicate the line of the highway, nor any fence or other obstruction between the highway, as travelled, and the post. The highway crosses the railroad near the place of accident, and the stone post stood about fifty feet from the railroad track at the crossing. The defendant was in the highway, at or near the railroad crossing, with a pair of horses loaded with grain, going to the grist mill in Tilton village. The horses became frightened by an engine on the railroad near the crossing, and by reason thereof became unmanageable, and ran, striking the post with the end of the pole and breaking it off near the ground, destroying the lamp with the post. No

other injury was done by the accident. The shock produced by the collision with the post threw the defendant from his seat in the wagon, and he struck on the ground between the horses, but suffered no injury except a slight concussion. The defendant was in the use of ordinary care and skill in managing his team, until they became frightened as aforesaid.

The foregoing facts were agreed upon for the purpose of raising the question of the right of the plaintiff to recover in this action.

Rogers for the plaintiff.

Barnard & Sanborn for the defendant.

DOE, J. It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated that the defendant was without actual fault, — that he was not guilty of any malice, or unreasonable unskillfulness or negligence; but it is to be inferred that the fact was so; and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent and desire of the defendant.

Sir Thomas Raymond's report of *Lambert & Olliot v. Bessey*, T. Raym. 421, and *Bessey v. Olliot & Lambert*, T. Raym. 467, is, "The question was this: A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, whether the gaoler be liable to an action of false imprisonment and the judges of the common pleas did all hold that he was; and of that opinion I am, for these reasons.

"1. In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore Mich. 6 E. IV, 7, a. pl. 18. *Trespass quare vi & armis clausum fregit, & herbam suam pedibus calcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of

thorns, and he cut the thorns, and, they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house and a piece of timber falls on my neighbor's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea*.

"Mich. 23, Car. 1 B. R.; Stile 72, *Guilbert v. Stone*. Trespass for entering his close and taking away his horse. The defendant pleads that he, for fear of his life, by threats of twelve men, went into the plaintiff's house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant and make satisfaction to the plaintiff.

"Hob. 134, *Weaver v. Ward*. Trespass of assault and battery. The defendant pleads that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant, with his musket, *casualiter & per infortunium & contra voluntatem suam* in discharging of his gun hurt the plaintiff, and resolved no good plea. So here though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained. But the three other judges resolved that the defendant, the gaolor, could not be charged, because he could not have notice whether the prisoner was legally arrested or not."

In *Fletcher v. Rylands*, L. R. 3 H. L. 330, Lord Cran-

worth said, — “in considering whether a defendant is liable to a plaintiff for a damage which plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.”

The head-note of *Weaver v. Ward*, Hob. 134, is, — “If one trained soldier wound another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear from the defendant’s plea that he was guilty of no negligence, and that the injury was inevitable.” The reason of the decision, as reported, was this: “For though it were agreed, that if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.”

There may be some ground to argue that “utterly without his fault,” “inevitable,” and “no negligence,” in the sense intended in that case, mean no more than the modern phrase “ordinary and reasonable care and prudence;” and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all “the circumstances” or evidence sustaining the plea would be substantially in compliance with the law of that case, due

allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often liable "because," as Raymond says, "he that is damaged ought to be recompensed;" and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party suffering," more than the negligence and blameworthiness of the defendant: but how much more it regarded the former than the latter, was a question not settled, and very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him: when and why the "loss and damage" should, and when and why they should not be transferred from one to the other, by process of law, were probably not solved in a philosophical manner. There were precedents, established upon superficial, crude and undigested notions; but no application of the general system of legal reason to this subject.

Mr. Holmes says, — "it may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort (than actual fault), and in modern times to more or less definitely thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, anything savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a cause of action as an intentional one. On the other hand, when, as in *Rylands v. Fletcher*, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle,

sufficient to charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." He alludes to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at a certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly assumed ground of decision. (7 Am. Law Rev. 652, 653, 662; 2 Kent Com. (12th ed.) 561, n. 1; 4 id. 110 n. 1.) If the hazardous nature of things or of acts is adopted as the test, or one of the tests, and the English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go to the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from anything done upon his own land" (Mellish's argument in *Fletcher v. Rylands*, L. R. 1 Ex. 272), and that an individual is answerable "who, for his own benefit makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor" — (Gibbs, Ch. J., in *Sutton v. Clark*, 6 Taunt. 44, approved by Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 286.) If danger is adopted as a test, and the English authorities are abandoned, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort, into a question of reasonableness in a form much broader than has been generally used; or courts will be left to devise tests of peril, under varying influences of time and place that may not immediately produce a uniform, consistent and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether, by transferring the hardship to the other party, anything more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief. For some of those decisions, better reasons may now be given than were thought

of when the decisions were announced ; but whether a satisfactory test of an actionable tort can be extended from the ancient authorities, and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in *Fletcher v. Rylands*, 3 H. & C. 774 ; L. R. 1 Ex. 265 ; L. R. 3 II. L. 330 ; L. R. Phil. ed. 3 Ex. 352, can be sustained, is very doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view is by Blackburn, J., who says in *Fletcher v. Rylands*, L. R. 1. Ex. 279, 280, 281, 282, — “ We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default ; or perhaps that the escape was the consequence of *vis major*, or the act of God ; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own ; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth or stench.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law, as to them, seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, — that is with regard to tame beasts,—for the grass they eat and trample upon, though not for any injury to the person of others; for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore (or he might have added, dogs to bite), but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. . . . In these latter authorities (relating to animals called mischievous or ferocious), the point under consideration was damage to the person; and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. . . . There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench or any other thing, which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor.”

This seems to be substantially an adoption of the early authorities and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damages to the defendant. The ancient rule was, that a person in whose house, or on whose land, a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss. (*Filliter v. Phippard*, 11 A. & E. N. S. 347, 354; *Tubervil v. Stamp*, 1 Comyns, 32; *S. C.*

1 Salk. 13; Com. Dig., *Action upon the case for Negligence*, A. 6; 1 Arch. N. P. 539; *Fletcher v. Rylands*, 3 H. & C. 790, 793; *Russell v. Fabyan*, 34 N. H. 218, 225.) No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied, by Blackburn, to everything which a man brings on his land which will, if it escapes, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule as laid down in the English cases, is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire on his own premises can be made liable if it escapes upon his neighbor's premises, and does him damage without proof of negligence." (*Loosee v. Buchanan*, 51 N. Y. 476, 487.)

Everything that a man can bring on his land is capable of escaping,—against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art,—and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things: it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty

carefully to do. The distinction made by Lord Cairns (*Rylands v. Fletcher*, L. R. 3 H. L. 330) between a natural and a non-natural use of land, if he meant anything more than the difference between a reasonable and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skilful and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. "Most of the rights of property, as well as of person, in the social state, are not absolute but relative" (*Losee v. Buchanan*, 51 N. Y. 485); and, if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In *Fletcher v. Rylands*, L. R. 1 Ex. 286, 287, Mr. Justice Blackburn, commenting upon the remark of Mr. Baron Martin, "that, when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible," says, "This is no doubt true; and, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the foot-path of a public street and kills a passenger (*Hammack v. White*, 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129); or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering (*Scott v. London Dock Company*, 3 H. & C. 596;

35 L. J. Ex. 17, 220); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what, *prima facie*, was a trespass, can be explained on the same principle, viz.: that the circumstances were such as to show that the plaintiff had taken that risk upon himself." This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident, carrying a traveller off the street. But such a doctrine would open more questions, and more difficult ones, than it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbors but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country, because he could not avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage

done by brutes or by fire, found in the early English cases, were introduced, by sacerdotal influence, from what was supposed to be the Roman or the Hebrew law. (7 Am. L. Rev. 652, n. 1 Domat. Civil Law, Strahan's translation, 2d ed. 304, 305, 306, 312, 313; Exodus 21: 28-32, 36; 22: 5, 6, 9.) It would not be singular if these rules should be spontaneously produced at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade and productive enterprise, — when the common law had not been set forth in the precedents as a coherent and logical system on many subjects other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them, as they were extended in *Rylands v. Fletcher*, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be contrary to American authority, as well as to our understanding of legal principles.

The difficulty under which the plaintiff might labor in proving the culpability of the defendant, which is sometimes given as a reason for imposing an absolute liability without evidence of negligence (*Rixford v. Smith*, 52 N. H. 355, 359), or changing the burden of proof (*Lisbon v. Lyman*, 49 N. H. 553, 568, 569, 574, 575), seems not to have been given in the English cases relating to damage done by brutes or fire. And however large or small the class of cases in which such a difficulty may be the foundation of a rule of law, since the difficulty has been so much reduced by the abolition of witness disabilities, the present case is not one of that class.

There are many cases where a man is held liable for taking,

converting (*C. R. Co. v. Foster*, 51 N. H. 490) or destroying property, or doing something else, or causing it to be done, intentionally, under the claim of right, and without any actual fault. "Probably one-half of the cases, in which trespass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights." (Metcalf, J., in *Stanley v. Gaylord*, 1 Cush. 536, 551.) When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act, or by an act of which he knew, or ought to have known, the damage would be a necessary, probable or natural consequence; or by an act which he knew or ought to have known to be unlawful — we understand the general law to be, that he is not liable. (*Vincent v. Stinehour*, 7 Vt. 62; *Aaron v. State*, 31 Ga. 167; *Morris v. Platt*, 32 Conn. 75; and Judge Redfield's note to that case in 4 Am. L. Reg. (N. S.) 532; Townshend on Slander, secs. 67, 88, p. 128, n. 1, 2d ed.) In *Brown v. Kendall*, 6 Cush. 292, the defendant, having interfered to part his dog and the plaintiff's, which were fighting, in raising a stick for that purpose, accidentally struck the plaintiff and injured him. It was held, that parting the dogs was a lawful and proper act which the defendant might do by the use of proper and safe means; and that if the plaintiff's injury was caused by such an act done with due care and all proper precautions, the defendant was not liable. In the decision there is the important suggestion that some of the apparent confusion in the authorities has arisen from discussions of the question whether a party's remedy is in trespass or case, and from the statement that when the injury comes from a direct act, trespass lies, and when the damage is consequential, case is the proper form of action, — the remark concerning the immediate effect of an act being made with reference to damage for which it is admitted there is a remedy of some kind, and on the question of the proper

remedy, not on the general question of liability. Judge Shaw, delivering the opinion of the court, said, — “We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. (2 Greenl. Ev., secs. 85 to 92; *Wakeman v. Robinson*, 1 Bing. 213.) If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. (*Davis v. Saunders*, 2 Chit. R. 639; Com. Dig. *Battery*, A. Day’s ed. and notes; *Vincent v. Stinehour*, 7 Verm. 62;” *James v. Campbell*, 5 C. & P. 372; *Alderson v. Waistell*, 1 C. & K. 358.)

Whatever may be the rule or the exception, or the reason of it, in cases of insanity (*Weaver v. Ward*, Hob. 134; Com. Dig. *Battery*, A. n. d, Hammond’s ed.; *Dormay v. Borradale*, 5 M. G. & S. 380; Sedgwick on Damages, 455, 456, 2d ed.; *Morse v. Crawford*, 17 Vt. 499; *Dickinson v. Barber*, 9 Mass. 225; *Krom v. Schoommaker*, 3 Barb. 647; *Horner v. Marshall*, 5 Munf. 466; *Yeates v. Reed*, 4 Blackf. 463¹), and whatever may be the full legal definitions of necessity, inevitable danger and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff’s land by a whirlwind, or he himself, by a stronger man, had been thrown through the plaintiff’s window. Upon the facts stated, taken in the sense in which we understand them, the defendant is entitled to judgment. (1 Hilliard on Torts, ch. 3, 3d ed.; *Losee v. Buchanan*, 51 N. Y. 476; *Parrott v. Wells*, 15 Wall. 524, 537; *Roche v. M. G. L. Co.*, 5 Wis. 55; *Eastman v. Co.*, 44 N. H. 143, 156.)

Case discharged.

¹ Estate of lunatic liable for actual damages caused by his wrongful killing of another (*McIntyre v. Sholty*, 121 Ill 660), also for injury from defective condition of his real estate. (*Morain v. Devlin*, 132 Mass. 87.) But not for slander. (Cooley on Torts, 2d ed. 119, and cases there cited.)

EXCEPTIONS, SECTION 9. COMMON RIGHTS.

PIXLEY v. CLARK.

(35 N. Y. 520. — 1868.)

F. Kernan for appellant.*D. Pratt* for the respondents.

PECKHAM, J. Action for damage for flooding plaintiff's land. The defendants purchased of the plaintiff a small strip of land on the borders of the Oriskany creek, in Oneida county. The whole strip so purchased they occupied by an embankment on that side of the creek, considerably higher than the natural bank, to prevent the overflow of the water caused by raising their dam. They raised their dam at four different times from 1853 to 1857 inclusive, in all fifty-eight and a half inches, so that the dam was then between nine and ten feet high. The embankment was some forty feet at the base, in and prior to 1857. The plaintiff owned sixteen acres of valuable land adjoining said embankment. Prior to 1857 it was dry, and bore good crops of almost any kind. In and after 1857, by this raising of the defendant's dam, this land became saturated with water and nearly worthless. From 1857, this lot, with the exception of a few knolls, "was saturated with water at all seasons." "It had become so saturated with water that no crops could be raised there," except on a "few little knolls near a blind-ditch made by plaintiff in 1856, where there was a strip as dry as formerly." That, on the rest of the lot, cat-tails and the coarse, wild grass of the marshes grew where formerly were the driest places. In 1858 the dam was drawn off for repairs, and so remained for two or three days, and then this land became comparatively dry. The water fell, in a hole dug on it, from twenty to twenty-four inches.

It was proved on the trial that the embankment was well made, and no signs of wet on its outside appeared. From these facts the judge held that the water must have gone through the natural earth in the creek into this land, and not

through the embankment, or between it and the natural soil, and nonsuited the plaintiff. On appeal, that nonsuit was sustained by the General Term in the fifth district, and plaintiff appealed to this court.

The single question presented on these facts is, whether the defendants had a right, by raising their dam, to "drown" the plaintiff's sixteen acres of land, by pressing the water through the natural banks of the stream, or otherwise. If he had, the nonsuit was right — if not, it was erroneous.

The general rule as to flowing or drowning lands is well settled. "If riparian proprietors use a water-course in such a manner as to inundate or overflow the lands of another, an action will lie, on the principle, *sic utere tuo ut alienum non laedas*." So, if he drown the land of another and rot his grass, an action lies (Angell on Water-Courses, sec. 330); and he adds: "The law on this subject, as thus laid down, is so well settled and so obviously just, as never to have been called in question." Again he says, that "no single proprietor, without consent, has a right to make use of the flow in such a manner as will be to the prejudice of any other." (Id., sec. 340.)

Washburn on Easements reiterates this doctrine. He says, on authority of cases cited, "that a man may not erect his dam so high as to set back water beyond his neighbor's line, in its natural and ordinary swellings, in some seasons of the year." "A flood" (not the high water of spring or fall) "is a different thing: when it does come, it is a visitation of Providence, and the destruction it brings must be borne by those on whom it happens to fall" (Washb. on Ease., ch. 3, sec. 13, p. 259); and he adds, on the authority of *Rex v. Trafford*, 1 Barn. & Ad. 259, which sustains him, "that no man may change or obstruct the flow of water of a stream for his own benefit to the injury of another," without being liable to an action; and see 3 Kent, 5th ed. 439, 440, to the same effect; and see *Browie v. The Cayuga & Susquehanna Railroad Company*, 2 Kern. 486; *Williams v. Nelson*, 23 Pick. 142, per Shaw, Ch. J. Upon this conceded principle of law, the plaintiff may rest his case. The defendants have so raised the water and set it back as to substantially drown or inundate the plaintiff's land. They have so obstructed the stream as to

seriously injure the sixteen acres of the plaintiff's land. This action will lie, then, unless defendants can show some exception to the general rule. The burden thereof rests upon them. The defendants answer, first, that a man may do a great many things on his own land that may result in damages to his neighbor, without being liable to an action therefor, and cite *Radcliff v. Brooklyn*, 4 Comst. 195, where Judge Bronson, after deciding the case before him, assumed to state what a man might do on his own land without being answerable for the consequences. But he did not say that an act of the kind complained of here was not actionable. He says: "Building a dam on one's own land, which throws back the water on the land of one higher up the stream, is an actionable injury." (p. 199.) That case, and every illustration in it, may be assented to without impairing the right to maintain this action.

The defendants' counsel says that the defendants had the right to build this dam to use their water-power, "and all that can be legally required of them is that they shall exercise it so as not to injure, directly or unnecessarily, the lands of their neighbor;" also, he says that "if one do a lawful act on his own premises, he cannot be held for the injurious consequences, unless it was so done as to constitute actionable negligence." These, like many general propositions, are plausible; but, as applied to this case, in the sense they are sought to be used, neither of them is law, and never was. Take the first: is any such principle found in any case, or stated by any elementary writer, as that you have a right to use your water-power, and build a dam for that purpose, and, if necessary to that end, you may flow and drown your neighbor's land, provided you do not do so "unnecessarily"? That you may do it, so far as is necessary to the full and profitable enjoyment of your water-power, even though you flow and destroy his farm?

The other proposition is very similar. Was it ever held or pretended that you might build a dam and flow another's land, provided you were guilty of no want of care or skill in its construction? In fact, the better dam you make—the more skilful and perfect its construction—the more water you restrain and throw back—the greater the damage to the

adjoining landowner. These are sound maxims, applied to many cases, but not to all. The latter may be admitted and applied here. The act of the defendants was lawful, in building their dam, so long as they did not injure their neighbor's land. The moment they so interfered by their dam as to flow his land to his injury, the act was unlawful. Did any declaration ever aver that the defendant, in building his dam, "unnecessarily" threw the water into plaintiff's land, or that he did so by carelessly or negligently constructing his dam? No such precedent can be found. The complaint in this case contains no such allegation.

The contrary of these propositions is decided in this court in *Tremain v. Cohoes Company*, 2 Comst. 163, where defendants dug a canal on their own land, and, in doing it, blasted the rocks so as to cast the fragments against plaintiff's house on contiguous grounds. In an action for that injury, this court held that evidence that work was done in the most careful manner was inadmissible. In *Hoy v. Cohoes Company*, 2 Comst. 159, involving a similar principle, Judge Gardiner, in delivering the unanimous opinion of the court, says: "A man may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal act in an unlawful manner." So, in *Bellinger v. New York Central Railroad Company*, 23 N. Y. 42, this court held (Denio, J., delivering the opinion) "that the maxim, *aqua currit et debet currere*, absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretence, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care. If one chooses, of his own authority, to interfere with a water-course, even upon his own land, he, as a general rule, does it at his peril, as respects other riparian owners above and below. But the rule is different where one acts under authority of law." It is not true, then, that the defendant must have

“carelessly” or “unnecessarily” injured the plaintiff to enable the plaintiff to sustain this action.

There is a class of cases, however, in reference to surface streams, where negligence is the foundation of the action; as where a riparian owner erects a dam, so carelessly or unskilfully that it is carried away, and owners below are thereby injured. (*The Mayor of New York v. Bailey*, 2 Denio, 433.) In such case, the riparian owner is held liable, unless the flood that carried it away should be regarded, substantially, as the act of Providence. The dam ought to be so constructed as “to resist such extraordinary floods as might be reasonably expected to occasionally occur;” otherwise, those erecting it are liable. (And see *The Inhabitants of China v. Southwick*, 12 Maine, 238.) But, as already seen, such a rule has no application to the case at bar.

It is, perhaps, not profitable to follow the counsel in his illustrations of the rights of landowners, as to other than water-rights. They are not pertinent, and their discussion may tend to confuse rather than enlighten the case before us.

The law as to surface streams, though peculiar, has been so frequently considered, and so carefully and fully adjudicated, that it requires no borrowed light to determine its controlling principles. One of its settled maxims, derived *ex jure naturæ*, is, *aqua currit et debet currere ut currere solebat*. It is declared by Kent to be the settled language of the law. (3 Kent, 4th ed. 439, and cases there cited; and see Angell on Water-Courses, sec. 95, &c.) In this principle all writers and authorities concur. (See *Tyler v. Wilkinson*, 4 Mason, 400.) Another maxim, flowing from the one above stated, is, that the owner of the bed of the stream does not own the water, but he only has a mere right to its use. He has a mere usufruct. He cannot detain it so as deprive an owner below of its use (*Merritt v. Brinkerhoff*, 17 Johns. 306), as one mill-owner on a stream has the same right as another to its reasonable enjoyment, unless one has acquired a superior right by grant or prescription. As between two mill-owners, the question sometimes arises as to a reasonable use or detention of the water by the upper mill. As each riparian owner can only use the water, and does not own it, it follows that each,

as against the other, must use it reasonably. If he do otherwise, and detain it unreasonably long, to the injury of the owner below, an action lies. (Wash. on Ease., 261, sec. 16.)

The defendants insist that they are not responsible where the damages are "casual, indirect and remote," and four cases are cited to sustain the proposition. One of them is *Smith v. Agawam Canal*, 2 Allen, 378. This was an action for damages to plaintiff's mills, caused by the water thrown back upon them from the defendant's dam. It was admitted in the opening that "When the water is unaffected by ice and freshets it does not, in any manner, affect the plaintiff's mills." On such occasions, the water and ice set back on him longer than it did before. The rights of parties in Massachusetts, as to the erection of dams, are regulated by statute. After alluding to this, and to the language of the judges in two other cases, Mr. Justice Merrick, in delivering the opinion of the court, said, that "the top of the defendant's dam was lower than the lower part of the plaintiff's wheel. From these facts it is a necessary consequence that if the plaintiff sustained any damage by the rise of water, it must have been owing to the occurrence of freshets and extraordinary floods." For the results of such causes, the defendants were held not responsible. Their dam was so constructed that, without the intervention "of forces, casual and extraordinary," no possible injury could have occurred to the plaintiff. If this damage occurred in ordinary stages of the water, the liability is admitted.

Another case was *Inhabitants of China v. Southwick*, 12 Maine, 238. Action for carrying off plaintiffs' bridge by the erection of defendants' dam. The jury found, under the charge of the judge, that the dam was not high enough to flow the plaintiffs' bridge, or to do damage thereto. Verdict for defendant, which the court sustained. The court remarked that the dam may have contributed to the injury, but it would be going too far "to run up a succession of causes and hold each responsible for what followed, especially when the succession was casual and unexpected as it was here." It was proved that the dam had been in that condition for a series of years, without flowing the plaintiffs' bridge or doing

it any damage. It was plainly the case of an extraordinary flood. The other case was *Monongahela Navigation Co. v. Coon*, 6 Barr. 379. Action for flowing plaintiffs' mills by the erection of defendants' dam. The defendants were held liable for the injury, under an accepted amendment to their charter, for damages sustained by plaintiffs' mills by a flood, although the court remarked that a riparian owner would not be liable for damages occasioned by floods, though the damages were increased by the dam in connection with the flood, if the dam did not flow the mill at other times.

The soundness of these decisions it is not necessary to discuss, as they have no application. The damage in the case at bar occurs, not "casually," but at all seasons of the year; in the summer working season, as well as others; nor is it caused by extraordinary floods.

Again, the defendants insist that the laws of surface streams do not apply to water circulating or percolating through the natural soil under the surface of the earth. The nonsuit was placed on this ground. No one disputes this, as an abstract proposition. But that does not aid the defendants. They must show that the rule applies the other way—that is, that the rules applicable to subterranean water apply also to living surface streams. That, they will fail to establish.

An owner of the land may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of the percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface. But the difficulty is the defendants are not sued for interfering with or cutting off percolating water.

The first and leading case is *Aeton v. Blundell*, in the Exchequer Chamber, 12 Mees. & Wels. 324. There the plaintiff had sunk a well on his own land, for raising water for the working of his mill. The defendants afterward sunk a coal-pit on their own land, whereby the plaintiff's well was made dry. *Held*, that they incurred no liability to the plaintiff thereby; that the law as to surface streams did not apply.

The court stated that there was a great difference in the cases. "In surface streams, the owner merely transmits the water over its surface. He receives as much from his higher neighbor as he transmits to his neighbor below. The level of the water remains the same. But if the man who sinks the well in his own land can acquire, by that act, an absolute right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, also, of debarring the owner of the land in which the spring is first found from draining his land for the proper cultivation of the soil." And the court expressly say, that, "if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law (as the right to surface streams), then, undoubtedly, the defendants could not justify the sinking of the coal-pits, and the action would lie."

Roath v. Driscoll, 20 Conn. 533, is another case of precisely the same character — wells sunk on each farm — and the like decision on like grounds. *Martin v. Riddle*, 2 Casey Penn. 415, in note, was simply an action against a party for stopping up a water-course, where plaintiff recovered — a *nisi prius* case; and the only remark touching this subject in the charge of the judge is, "that a party cannot justify the erection of an embankment to stop the water, if thereby the water is improperly forced upon another owner." *Broadbent v. Ramsbotham*, 34 Eng. Law. & Eq. 553, and *Rawstron v. Taylor*, 33 id. 428, simply hold, in substance, that an owner is not liable for the proper agricultural draining of his own land, although it may reduce the supply of a stream where plaintiff's mill was situated, provided such draining took away no water after it had reached a surface stream; that he could not divert the water "after it had arrived at, or was flowing into, some natural channel already formed." *Goodale v. Tuttle*, 29 N. Y. 459, is to the same general effect. The court here again remark, that the principle which governs the obstruction of running streams does not apply to waters running under the soil. *Chatfield v. Wilson*, 28 Verm. 49, and *Chasemore v. Richards*, 7 House of Lords Cases, 349, are to the same effect. In the

case last cited, it was expressly found, as a fact, that the act complained of (diverting the supplies to the river Wandle) "did not divert or abstract any water which had already joined the river Wandle, or which had already joined any surface stream running into it." Hence, the action did not lie. These actions were all for digging drains, sinking wells or pits, or making other improvements on their owners' lands, whereby water, percolating under the earth's surface, was interfered with to the damage of some other proprietor of other lands. In *Dickinson v. Canal Company*, 7 Exch. 282, decided since *Acton v. Blundell*, *supra*, it was expressly decided that sinking a well, and pumping thereout large quantities of water to supply the canal, whereby water that had already reached a surface stream was diverted by percolation, was actionable by the party on the stream. In *Chatfield v. Wilson*, *supra*, cited by defendants, the court, after citing *Acton v. Blundell*, and other like cases, remarked that the case of *Dickinson v. Canal Company*, *supra*, "is not opposed to the views taken in the foregoing cases. In that case the injury complained of was the diminution of water in the surface stream; and the law applicable to surface streams was applied. It was treated as a diversion of surface water, and actionable at common law." Surely, if you cannot subtract or divert the water of a surface stream to the injury of a riparian owner, even by percolation, caused by a well on your own land, you will be liable to your neighbor for your direct interference with a surface stream, whereby he is injured by percolation you have yourself unlawfully created. In *Cooper v. Barber*, 3 Taunt. 99, the plaintiff had diverted the water of a surface stream by penstocks, to irrigate his land: by means thereof, he injured defendant's land, through the consequent percolation of water under the soil, so as to overflow his kitchen and cellar. The defendant broke down one penstock and removed the upper boards of another, and his house became directly dry. In an action by plaintiff for destroying the penstock, the court held the action would not lie for that part of the injury to the penstocks necessary to abate the nuisance.

The principle which exempts a party from liability for digging upon and cultivating his own land as he pleases, though

he may interfere with subterranean water, is designed for the benefit and protection of the landowner. As sought to be applied here, it would work his great injury. Landowners, under this rule, in the neighborhood of surface streams, could never know their rights or the value of their lands. They would be subject to the superior rights of mill-owners to damage the land for their benefit, without compensation.

The case, then, stands thus: The defendants are sued for drowning the plaintiff's land by an unauthorized interference with a surface stream, by pressing a part of that stream through its banks, by means of their artificial works, into the lands of the plaintiff, to his injury. The defendants answer, true, we did that for our benefit, but the law allows a party to interfere with underground, dead or percolating water, by sinking a well or digging drains on his own land. The reply is, you have interfered with a surface stream, not with underground, percolating water, and hence the doctrine of those cases affords you no protection. The point is, that the defendants, by their interference with a surface stream, have wrongfully pressed a part of it into percolated water, and thus drowned the plaintiff's land. When sued for this interference with a living, surface stream, they answer that they are not liable for interfering with water percolating under the earth. They insist upon defending themselves against something for which they are not prosecuted. To hold that defendants would be liable, if their interference with the surface stream had damaged the plaintiff, by overflowing the natural banks and pressing it through the artificial embankment, but not if they pressed it through the natural banks, would be about as sound legal justice, to my mind, as if we should hold a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability. Defendants also insist that they are not liable because it is not known how the injury occurred—that the principle is not understood. It is clear in this, as in the case of *Cooper v. Barber*, 3 Taunt. 99, and upon like proof, that this dam has, in fact, caused the injury, though we may fail to discover the principle on which it was done. The learned judge there called it a mere pre-

tence to contend otherwise as to the fact. The defendant, then, is as much answerable for it as one would be who choked another to death, though it should be proved that science was utterly unable to declare how life should entirely leave the body by mere pressure upon the throat for a couple of minutes. These defendants tried an experiment for their own benefit, and found it seriously injured the plaintiff. When they see the injury they insist upon continuing it. They add that the plaintiff can protect himself, if he will appropriate a part of his land to a ditch, and will incur the expense of digging the ditch and keeping it in repair for their benefit. This shocks the sense of honesty and justice. To look after the mysteries that attend the circulation of subterranean water, not caused by interfering with a surface stream, is to seek darkness rather than light. There is no mystery as to the cause of this damage.

It is a familiar rule, that the pressure of water is in proportion to its height. The water was raised much higher than in its natural condition, and its natural banks, by this dam; and it is entirely clear that it was pressed into this land, either through the natural or artificial banks, or else between them. That was the position assumed at the circuit: when the water from the dam was drawn off, the water left this land. It is, therefore, not that the defendants have unreasonably, negligently, unintentionally, unnecessarily or unexpectedly flowed the plaintiff's land, to his injury, for their benefit, that they are liable. It is simply because they have done it in fact: they have done it by their works, and it cannot be charged to extraordinary floods. In the language of the old books, "the defendants' *exaltavunt stagnum* by which the plaintiff's meadow was flooded," and they are liable therefor. (Godbolt, 58.) The necessity, motive, knowledge or care of defendants, forms no element of this action. Not the peculiar mode or manner of the injury, but the fact of the injury caused by the dam, in *any* mode or manner, is the ground of the action. Landowners have purchased their farms where a surface stream runs, in view of the conceded right to have that stream continue as it had been accustomed to run. If its current be interfered with, in any manner to the damage of their land,

an action lies. An owner may dig upon or cultivate his land at his pleasure, though he cut off, or open, water circulating or dead under the earth, to his neighbor's injury. Such water is not different from the earth itself. He owns it. He does not own the water of a surface stream, and cannot set it back to another's injury, without liability.

The defendants also insist that the injury might be remedied by the plaintiff, at small cost, by digging a drain along the embankment. If this were true, he is not bound to do it. As the defendants caused the damage, without authority, and for their own benefit, they should find the remedy at their own expense. They might have purchased more land in which to make the ditch, if they have no ground now, or purchased the right to flow the land of their neighbor. (*Earle v. DeHart*, 1 Beasl. 280; Wash. on Ease., 358.)

I have thus examined all the grounds on which the right to do this injury is based, and deem them all untenable. The defendants have violated the rights of the plaintiff, and flowed his land to his damage; law and justice alike require that they should pay that damage. It is urged by the defendants' counsel that, if mill-owners are held responsible for such damages, many of the mills may be ordered to be abated and destroyed. Not so; for probably no such right has ever before been claimed. But the answer to such an objection is precisely the same as would be given in case of injury by any other mode of flooding a person's land, for which they who cause it are confessedly liable. If they have flooded it for more than twenty years, they have the right to continue, on the legal presumption of a grant. Otherwise, if they will obstruct the natural flow of an open, running stream for their own profit, they must see to it that they do not thereby flood their neighbor's land to his injury. For any light, trivial damage, by flowing over or through the bank, no court of equity, in the exercise of a conceded discretion on that subject, would interfere by injunction, or by order to abate. For a substantial injury, they would, as they should, grant relief. A court of equity will always see that substantial justice is done. It does not execute even legal rights, when to do so would be oppressive, but leaves the party to his remedy at law.

The judgment should be reversed and a new trial ordered, costs to abide the event.

DAVIES, Ch. J., read an opinion for affirmance, in which MORGAN, J., concurred.

Judgment reversed.

THE S. R. BANK v. THE S. BANK.

(27 Vt. 505. — 1854.)

J. S. Marcy and J. P. Kidder for the plaintiffs.

O. P. Chandler and Converse & Barrett for the defendants.

BENNETT, J. This case comes up upon a general demurrer to the plaintiff's declaration, and, of course, the only question is whether a legal cause of action is set out in the declaration. It may with truth be said, that an attempt to maintain an action upon the facts stated in the declaration is novel; but this does not prove conclusively that the action cannot be sustained in this age of progress. The facts stated in the declaration are briefly that the plaintiffs, being a banking corporation, had put in circulation a large amount of their bills, and that the bills would have had a continued and extended circulation, had it not been for the acts of the defendants, to the great gain and profit of the plaintiffs; and that the Suffolk Bank bought them up from time to time, and have refused again to exchange them for other money and kept them out of circulation, and have called upon and compelled the plaintiffs to redeem the bills in specie.

The declaration charges that the acts of the defendants were performed with wicked and corrupt motives, and with an intent to injure, oppress and embarrass the plaintiffs in their business, whereby they have been damaged in their business; harassed, oppressed and deprived of great gains, as they say, which they otherwise would have made, to wit, ten thousand dollars. It is hardly necessary to say that the plaintiffs issued their bills as a circulating medium in lieu of specie currency, and that it was the right of the defendants, in common

with others, to purchase in their bills, and thus withdraw them from circulation, until they should choose again to put them in circulation or call upon the plaintiffs to redeem their promise by the payment of their bills in specie.

The defendants are not charged with doing any act in itself considered wrong, but it is attempted to make the acts actionable by reason of the bad motive imputed to the defendants in doing them. This case seems to us but an ordinary one of a creditor calling upon his debtor for his pay, at a time, and at a place, and in a manner to which the debtor has no right to make objection. It was morally and legally the duty of the plaintiffs at all times to be ready and willing to redeem their bills, and if it has operated to their injury to be called upon at any particular time to redeem a particular amount, it is "*damnum absque injuria*." Here was no unlawful conspiracy by the defendants with others, either to do a lawful act in an unlawful manner, or an unlawful act to the injury of the plaintiffs; but the declaration charges, in effect, that the acts were done from bad motives in the defendants. This, we think, is not enough. Motive alone is not enough to render the defendants liable for doing those acts which they had a right to do. It is too well settled to need authority that malice alone will not sustain an action for a vexatious suit. There must also be want of probable cause. This principle is enough to settle this case. If the defendants could not be sued for instituting suits, maliciously to collect pay upon the plaintiffs' bills which they lawfully held, much less could they be sued for simply calling upon the defendants for pay, without the intervention of a suit, though done with malice. It may be true that sometimes the consequences attending an act may serve to give character to that act, and the rule has become established and grown into a maxim that a man must use his own rights with due regard to the rights of others; but this principle does not apply to the present case. Here the act of presenting the plaintiffs' bills for payment has no natural connection with any injurious consequences to follow from it, and if such consequences follow they must be fortuitous, and cannot give character to the act so as to render it unlawful. (See *Williams v. Hunter*, 3 Hawks, 545; also 31 Maine, 438.).

It seems impossible to distinguish the case made in the plaintiffs' declaration from an action for maliciously holding a party to bail, or suing out a writ when nothing is due, in which case the gist of the action is malice and the want of a probable cause, and the principle of that class of cases must govern this.

The result is, the judgment of the county court is affirmed.

EXCEPTIONS, SECTION 10. LICENSE.

BARHOLT v. WRIGHT.

(45 Ohio St. 177. — 1887.)

THE plaintiff below brought suit against the defendant to recover damages for an assault and battery committed upon his person. The answer was a general denial. Upon the trial of the issue, the jury, under the charge of the court, rendered a verdict for the defendant. A motion for a new trial, assigning error in the charge, was overruled by the court, and a bill of exceptions taken. Upon error the judgment was reversed in the Circuit Court, and the cause remanded for a new trial; and the defendant below now prosecutes error in this court to reverse the judgment of the Circuit Court.

The evidence is not set out in the bill of exceptions; but it appears from the bill, that, upon the trial, the plaintiff offered evidence tending to show that he and the defendant went out to fight by agreement and did fight, and was severely injured by the defendant; among other injuries inflicted upon him, one of his fingers was so bitten by the defendant that it had to be amputated. By reason of the injuries so received, he became ill, was disabled for work for a long time, and was put to considerable expense in being cured. The court, however, charged the jury that if the parties went out to fight by agreement, and the plaintiff received the injuries complained of from the defendant while the fight was going on and in the course of it, he could not recover. The accuracy of this charge is the question presented by the record.

P. B. Conant and J. N. Nichols for plaintiff in error.

W. B. Thomas, George F. Robinson and Cole & Wright for defendant in error.

MINSHALL, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff, if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim, as old as the law, *volenti non fit injuria*, forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. (Broom's Leg. Max. 268.)

But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement, may be shown in mitigation of damages. (2 Greenleaf Ev. sec. 85; *Logan v. Austin*, 1 Stewart, 476.) This, however, is the full extent to which the cases have gone. We will notice a few of them. In *Boulter v. Clark*, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the Chief Baron saying, "the fighting being unlawful, the consent of the plaintiff to fight, if proved, would

be no bar to his action." (Buller's *Nisi Prius*, 16.) A number of earlier cases were cited, and among them that of *Mathew v. Ollerton*, Comb. 218, where it said "that if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that this case was not an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Stephen's *Nisi Prius*, 211, it is said: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in *Bell v. Hansley*, 3 Jones, N. C. 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply." The following cases are to the same effect: *Stout v. Wren*, 1 Hawks, 420; *Adams v. Waggoner*, 33 Ind. 531; *Shay v. Thompson*, 59 Wis. 540; *Logan v. Austin*, 1 Stewart, 476. And so it was held in *Commonwealth v. Collberg*, 119 Mass. 350, that where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or ill-will. *Champer v. State*, 14 Ohio St. 437, is not in conflict with this, as will be explained hereafter.

No case has been cited that can be said to be to the contrary. What is said by Peck, J., in *Smith v. State*, 12 Ohio St. 466, that "an assault upon a consenting party would seem to be a legal absurdity," must be applied to the facts of that case. The judge was discussing the sufficiency of a count in an indictment for an assault with intent to commit a rape, without an averment that it was made forcibly and against the will of the female. The absence of consent is essential to the crime of rape, or of an assault with intent to commit a rape, where the female has arrived at the age at which consent may be given. Intercourse, because illicit, does not amount to an assault where the female consents, however wrong it may be in morals.

This is all that was meant by the learned judge in using the language quoted from his opinion.

In all such cases the consent of the female would, without doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge Cooley in his work on Torts, p. 163, that "consent is generally a full and perfect shield when that is complained of as an injury which was consented to. . . . A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The State is wronged by this and forbids it on public ground. . . . The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order." (See, also, to like effect, Pollock on Torts, 139.)

Neither is the case of *Champer v. State*, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The case seems to have been somewhat misapprehended by the courts of some of the States, as well as by some text-writers. By the statutes of this State a distinct offence is made of an affray or agreement to fight; and the effect of the holding is that where such an offence is committed, the indictment must be for an affray, and not for an assault and battery. The civil right of either party to recover of the other for injuries received in an affray, is not affected by the statute nor by the decision just referred to. Such seems to have been the view taken by Boynton, J., in the subsequent case of *Darling v. Williams*, 35 Ohio St. 63.

The case of *Fitzgerald v. Cavin*, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm if the act was intentionally done.

It is upon the same principle of public policy that one, who is the first assailant in a fight, may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is

reasonably necessary to his defence, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the assailant for the excess of force used beyond what was necessary for self-defence. (*Dole v. Erskine*, 35 N. H. 503, criticising *Elliott v. Brown*, 2 Wend. 499; Cooley on Torts, 165; *Darling v. Williams*, 35 Ohio St. 63; *Gizler v. Witzel*, 82 Ill. 322. And see, also, *Commonwealth v. Collberg*, *supra*.)

It would seem that under the code the right of each combatant to damages might be determined and measured in the same action. (Swan's Plead. Prec. 259, n. a.)

And upon like principle it has been ruled that the doctrine of contributory negligence has no application to an action to recover damages for an assault and battery. (*Ruter v. Foy*, 46 Iowa, 132; *Steinmetz v. Kelly*, 72 Ind. 442; *Whitehead v. Mathaway*, 85 Ind. 85.) Negligence of the plaintiff contributing to the injury of which he complains, is taken into consideration only in those cases where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong.

* * * * *

Judgment affirmed.



EXCEPTIONS, SECTION 11. NECESSITY.

CAMPBELL v. RACE.

(7 Cush. 408. — 1851.)

W. Porter and *J. C. Wolcott* for the defendant.

I. Sumner for the plaintiff.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule

is so laid down in the elementary books (2 Bl. Com. 36; Woolrich on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38); and it is fully supported by the adjudged cases. (*Henn's Case*, W. Jones, 296; 3 Salk. 182; 1 Saund. 323, n. 3; *Absor v. French*, 2 Show. 28; *Young v. —*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 M. & S. 387, 393.) Such being the admitted rule of law as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this Commonwealth, entitle his opinion to very great weight, adopts the rule; as declared in the leading case of *Taylor v. Whitehead*, *ubi supra*, which he says "is the latest on the point, and settles the law." (3 Dane Ab. 258.) And so Chancellor Kent states the rule. (3 Kent Com. 424.) We are not aware of any case in which the question has been directly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well-settled law. (*Holmes v. Seely*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Barb. 652.) These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon

any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases, the only escape is, by turning out of the usually travelled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a

maxim of the common law, that where public convenience and necessity come in conflict with private life, the latter must yield to the former. A person travelling on a highway is in the exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed, that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested, that the statutes of the Commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this Commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable—of obstructions, caused by sudden and recent causes, which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides, the statute liability of towns does not extend to damages such as

would ordinarily arise from the total obstruction of a highway; being expressly confined to cases of bodily injuries and damages to property. (St. 1850, c. 5; *Canning v. Williamstown*, 1 Cush. 451; *Harwood v. Lowell*, 4 Cush. 310; *Brailey v. Southborough*, 6 Cush. 141.)

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; *cesante ratione, cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveller. In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas.¹

Exceptions sustained.

¹ For right to destroy property of another in case of fire, see *Am. Print Works v. Lawrence*, 23 N. J. L. 9, 590.

*EXCEPTIONS, SECTION 12. PRIVATE DEFENCE.**LIVERMORE v. BATCHELDER.*

(141 Mass. 179. — 1896.)

TORT for killing the plaintiff's dog. Trial in the Superior Court, without a jury, before Brigham, Ch. J., who found the following facts:

The plaintiff, on February 20, 1884, was the owner of a dog, which was duly licensed by the town of Reading, and wore a collar, duly marked as required by the Pub. Sts. c. 102, sec. 80.

On said February 20, the plaintiff's dog with another dog, came upon the defendant's premises and there killed and maimed hens of the defendant, which were in his hen-house or shed. The dogs were driven away, and, in about fifteen minutes afterwards, came again upon the defendant's premises and were running toward the same shed and hen-house of the defendant, when the defendant, having reasonable cause to believe that the dogs were proceeding to maim and kill others of his hens in said shed and hen-house, shot and killed the plaintiff's dog.

Upon these facts the judge ruled that the defendant's killing of the plaintiff's dog under the circumstances stated, was not in law justifiable; and thereupon found and ordered judgment for the plaintiff. The defendant alleged exceptions.

I. W. Richardson for the defendant.

J. G. Holt for the plaintiff.

HOLMES, J. The ruling of the court, as we understand it, meant that the facts found, without more, did not disclose a justification for killing the plaintiff's dog. It was found that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but not that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens. The justification, therefore, was not made out. (*Wright v. Ramscot*,

1 Saund. 84; *Janson v. Brown*, 1 Camp. 41. See *Commonwealth v. Woodward*, 102 Mass. 155, 161.)¹

It is unnecessary to consider whether the common-law remedy is taken away by the Pub. Sts. c. 102, secs. 80-110.

Exceptions overruled.

EXCEPTIONS, SECTION 13. PLAINTIFF A WRONG-DOER.

WHITE v. LANG.

(128 Mass. 598. — 1880.)

TORT, under the Gen. Sts. c. 88, sec. 59, to recover double the amount of damage alleged to have been caused by the defendant's dog. Answer, a general denial.

At the trial in the Superior Court before Pitman, J., without a jury, it appeared that the plaintiff, on Sunday, April 8, 1877, was driving his horse and buggy along a public highway in the city of Boston; that, while so driving, the defendant's dog jumped at the head of the plaintiff's horse and frightened him so that he became unmanageable, ran and overturned the buggy, whereby the same and other property of the plaintiff was damaged; and that, before the accident, the defendant knew of no mischievous or vicious propensity in the dog to attack or harass persons or animals.

The defendant offered evidence to show that the plaintiff was unlawfully travelling on the Lord's day, and not from necessity or charity; but the judge ruled that these facts would constitute no defence, or prevent the plaintiff from recovering; and found for the plaintiff in double the amount of damage sustained by him. The defendant alleged exceptions.

H. E. Ware for the defendant.

E. T. Buss for the plaintiff.

¹ A different rule obtains in many States under special statutes. (*Marshall v. Blackshire*, 44 Ia. 475; *Hinckley v. Emerson*, 4 Cow. 351; Cooley on Torts, 2d ed. 408, n.)

MORTON, J. We must assume, for the purposes of this case, that the plaintiff was unlawfully travelling on the Lord's day. But this fact does not defeat his right to recover, unless his unlawful act was a contributory cause of the injury he sustained. (*McGrath v. Mervin*, 112 Mass. 467; *Marble v. Ross*, 124 Mass. 44, and cases cited.) It has been held in this Commonwealth that if a person, who is unlawfully travelling on the Lord's day, is injured by a defect in the highway, or by a collision with a vehicle of another traveller, he cannot recover for the injury. This is upon the ground that his illegal act aids in producing the injury, or, in other words, is a contributory cause. (*Lyons v. Desotelle*, 124 Mass. 387; *Connolly v. Boston*, 117 Mass. 64.)

On the other hand, it has been held in several cases that if a person, who is at the time acting in violation of law, receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause of the injury. (*Marble v. Ross*, *ubi supra*; *Steele v. Burkhardt*, 104 Mass. 59; *Kearne v. Sowdan*, 104 Mass. 63, n.; *Spofford v. Harlow*, 3 Allen, 176.)

We are of opinion that the case at bar falls within the last named class. If a man while travelling is injured by an assault, the act of travelling cannot in any just sense be said to be a cause of the injury. It is true that, if he were not travelling, he would not have received the injury, but the act of travelling is a condition and not a contributory cause of the injury. The plaintiff when travelling was assaulted and injured by a dog for whose acts the defendant is responsible. (Gen. Sts. c. 88, sec. 59; *LeForest v. Tolman*, 117 Mass. 109; *Sherman v. Favour*, 1 Allen, 191.) The act of travelling had no tendency to produce the assault or the consequent injury; and therefore, though the plaintiff was travelling in violation of law, it does not defeat his right of recovery.

Exceptions overruled.

PLATZ v. CITY OF COHOES.

(89 N. Y. 219. — 1882.)

G. L. Stedman for appellant.*Rufus W. Peckham* for respondent.

DANFORTH, J. The defendant made an excavation in one of its public streets, and neither removing or levelling the earth taken therefrom, left it in the way. While the respondent was riding with her husband, the carriage in which they were was, without carelessness on the part of either, upset by the pile of earth, and she was injured. That the street was defective through the culpable omission of duty on the part of the defendant is not denied, but the accident happened on Sunday, and the learned counsel for the appellant claims that it owed no duty to the plaintiff to keep its streets in repair on that day, because it did not appear that she was then travelling "either from necessity or charity," nor for any purpose permitted by the law. It is plain, therefore, that she was violating the statute relating to the "observance of Sunday" (1 R. S. 628, title 8, chap. 20, art. 8, sec. 70), but we do not perceive how that fact relieves the defendant.

It imposed an obligation on the plaintiff to refrain from travelling, and for its violation prescribed a forfeiture of one dollar. It also declares that upon complaint made before a magistrate, and conviction had, that sum might be collected by distress and sale of the goods and chattels of the offender, or if sufficient could not be found, she might be "committed to the common jail for not less than one or more than three days." The statute goes no further, and we are aware of no principle upon which it can be held that the right to maintain an action in respect of special damage resulting from the omission of the defendant to perform a public duty is taken away because the person injured was at the time disobeying a positive law. The courts are required to construe a penal statute strictly, and having before him for judgment, an alleged violation of the Sunday law, Lord Mansfield said: "If the act of Parliament gives authority to levy but *one*

penalty, there is an end of the question, for there is no penalty at common law." (*Crepps v. Durden*, 2 Cowper, 640.) This was a proceeding to enforce the statute, but in *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221, an action by a passenger against a carrier to recover damages for injuries received through its carelessness, this court held that the fact, "that the plaintiff was at the time of the injury travelling contrary to the statute," was no defence to the action. The policy of the statute and its limitations were then considered, and the court refused to add to the penalty imposed by it a forfeiture of the right to indemnity for an injury resulting from the defendant's negligence.

The Sunday law received a similar construction in *Phila., Wil. & Balt. R. R. Co. v. Phil. & Havre de Grace Steam Tow-boat Co.*, 23 How. U. S. Sup. Ct. Rep. 209, the court holding that the offender, the plaintiff in the action, was liable to the fine or penalty imposed thereby, and nothing more, saying, "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of \$7000, on the libellants, by way of set-off, because their servants may have been subject to a penalty of twenty shillings each for breach of the statute." To the same effect is *Baldwin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670.

It may indeed be said that if the plaintiff had obeyed the law, remained at home, and not travelled, the accident would not have happened. That is not enough. The same obedience to the law would have saved the plaintiffs in the cases just cited. It must appear that the disobedience contributed to the accident, or that the statute created a right in the defendant, which it could enforce. But the object of the statute is the promotion of public order, and not the advantage of individuals. The traveller is not declared to be a trespasser upon the street, nor was the defendant appointed to close it against her. In such an action the fault which prevents a recovery is one which directly contributes to the accident; as carelessness in driving, either a vicious or unmanageable horse, or at an improper rate of speed, or without observation of the road, or in an insufficient vehicle, or with a defective harness, or in a state of intoxication, or under some

other condition of driver, horse or carriage, which may be seen to have brought about the injury.

It may doubtless be said that if the plaintiff had not travelled, she would not have been injured; and this will apply to nearly every case of collision or personal injury from the negligence or wilful act of another. Had the injured party not been present he would not have been hurt. But the act of travel is not one which usually results in injury. It, therefore, cannot be regarded as the immediate cause of the accident, and of such only the law takes notice. At common law the act was not unlawful, and the plaintiff was still under its protection, and may resort to it against a wrong-doer by whose act she was injured. This has been held in many cases where the person injured was at the time doing an act prohibited by the city ordinance or general statute (*Steele v. Burkhardt*, 104 Mass. 59; *Welch v. Wesson*, 6 Gray, 505; *Norris v. Litchfield*, 35 N. H. 271), and even violating the law now in question, or one similar to it. *Carroll v. Staten Island Co. and Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Towboat Co.* have already been referred to. (See also *Schmid v. Humphrey*, 48 Iowa, 652; 30 Am. Rep. 414.)

Sutton v. The Town of Wauwatosa, 29 Wis. 21; 9 Am. Rep. 534, is in point, not only in its circumstances but in the relations of the parties. The plaintiff was driving his cattle to market on Sunday, and they were injured by the breaking down of a defective bridge which the defendant, through negligence, had failed properly to maintain. The Sunday statute was relied upon, but the town was held liable. In this State a municipal corporation is regarded as a legal entity, and responsible for its omission to perform corporate duties, to the same extent as a natural person would be under the same circumstances. (*Dillon on Municipal Corporations*, sec. 778; *Bailey v. The Mayor*, 3 Hill, 531.) The authorities, therefore, which deny to an individual through whose negligence another has been injured immunity from the consequences of his wrong, because the injured person was violating the law in question, apply here. Many of them are referred to in the cases named above and need not again be cited.

There are, as the counsel for the appellant contends, author-

ities the other way. Decisions by very eminent and learned courts. In Vermont: *Johnson v. Town of Irasburgh*, 47 Vt. 28; 19 Am. Rep. 111; *Holcomb v. Town of Danby*, 51 Vt. 428. In Massachusetts: *Bosworth v. Swansey*, 10 Met. 363; *Jones v. Andover*, 10 Allen, 18. And immunity is also given by that court, under the same statute, to a railroad corporation through whose negligence the plaintiff was injured. (*Smith v. Boston & Maine R. R.*, 120 Mass. 490; 21 Am. Rep. 538.) But the decisions already made by us (*Merritt v. Earle*, 29 N. Y. 115; *Wood v. Erie Railway Co.*, 72 id. 196; 28 Am. Rep. 125; *Carroll v. Staten Island R. R. Co.*, *supra*) are in the contrary direction, and are sustained, we think, by reasons of justice and public policy. In *Baldwin v. Barney*, *supra*, a question arising under the Sunday laws of Massachusetts came before the court in an action by one injured in that State, while travelling on Sunday, by the reckless driving of one also travelling. On the trial the plaintiff was nonsuited, but on appeal the Massachusetts cases are reviewed and disapproved, and after a very deliberate discussion of the decisions in that and other States the court held that the defendant could not show the illegality of the plaintiff's act as a defence, and the nonsuit was set aside. There will be seen great conflict in decided cases, but the weight of authority seems to favor the conclusion already reached by us. (Cooley on Torts, sec. 157; Wharton on Negligence, sec. 331.)

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Judgment affirmed.

GENERAL EXCEPTIONS.

CAMPBELL v. SHERMAN.

(35 Wis. 103. — 1874.)

ACTION for the unlawful seizure and conversion by the defendant, sheriff of Eau Claire County, of plaintiff's steamboat with its tackle and furniture.

COLE, J. The able and ingenious counsel for the defendant did not seriously contend that ch. 184, Laws of 1869, so far as it attempted to authorize a proceeding *in rem* against a vessel for the enforcement of a maritime contract, could be sustained as a valid enactment. The decisions of the Supreme Court of the United States are too clear and emphatic upon that question to allow any discussion, unless their binding authority is denied — a position not assumed in the argument. (Cases cited.) In view of these various adjudications, it is idle to argue in favor of the proposition that the State Legislature has authority to create maritime liens, or the power to confer upon a State court jurisdiction to enforce such a lien by a proceeding *in rem* against the vessel according to the practice in admiralty. That a proceeding against a vessel to enforce a contract for pilot's wages is a subject of admiralty jurisdiction, and partakes of all the incidents of a suit in admiralty, is equally well settled. It therefore results from these propositions of law, that the Circuit Court which issued the warrant commanding the sheriff to seize and safely keep the steamer *Ida Campbell* to answer any lien which should be established against the boat in favor of the plaintiff in that action for pilot's wages, had no jurisdiction of the cause, and its process was void. It gives no strength to the position of defendant's counsel, nor does it aid the discussion, to say that the Circuit Court is a court of general jurisdiction, when it is conceded that it has no jurisdiction over a proceeding exclusively vested in the courts of the United States. For as to the subject-

matter of such a suit, it had no jurisdiction whatever, and the act of the Legislature clothed the court with no power to try and determine it. The party might, of course, have brought his action in the Circuit Court to enforce a common law remedy; but when he resorted to it to enforce a maritime lien by a proceeding *in rem*, the court had no jurisdiction of the cause.

This being the case, the further question arises, Did the warrant thus issued in a cause over which that court had no jurisdiction, afford any protection to the officer for acts done in its execution? The counsel for the defendant contends that it would protect the officer, and that, if fair and regular on its face, he had no right and it was not his duty to inquire whether the court which issued it had jurisdiction of the cause. Where the subject-matter of the suit is within the jurisdiction of the court, yet jurisdiction in the particular case is wanting, there is certainly reason and authority for holding that an officer who executes a process fair upon its face, shall be protected. But a clear distinction exists between that case and a proceeding in which the process itself shows that the court had exceeded its jurisdiction. The rule is stated by Mr. Justice Smith in *Bagnall v. Ableman*, (4 Wis. 163,) in the following language: "When the process is fair on its face, and issued by a court or magistrate of competent jurisdiction, it is a protection to the officer. But if it be not fair and regular upon its face, or its recitals or commands show a want or excess of jurisdiction in the court or magistrate issuing it, the officer is not protected in its execution." p. 179. The form of the warrant issued in the present case is not set forth in the answer. But it was undoubtedly such a process as the clerk was required to issue upon the filing of the complaint, and it would show upon its face that it was issued in a proceeding instituted under the provisions of ch. 184. It would command the officer to attach and seize the steamer *Ida Campbell*, her tackle, apparel and furniture, if found within his county, and safely keep the same to answer all such liens as should be established against it in favor of the plaintiff in the cause. It would properly contain recital showing that a complaint had been filed with the clerk, and state the nature and amount of the demand for which a lien was claimed against the vessel. We

must presume from the matters stated in the answer, that such was the form of the warrant under which the officer acted; and furthermore a process setting forth these facts would be required by the law under which the proceeding was taken. And it is very apparent that such a warrant would show upon its face the nature of the proceeding, and that the suit was instituted to enforce a maritime lien. In other words, it would show that the Circuit Court had no jurisdiction of the subject-matter of the action, and no power to hear and determine it. And we understand the rule to be, that where the process does thus show a want of jurisdiction in the court of the subject-matter of the action, it is void, and does not protect the officer. In this all the cases agree.

But it is said that this rule imposed upon the officer in the present case the duty of determining, in advance of any decision of the courts of this State, the validity of an act of the Legislature. How can it be expected, it is asked, that a mere ministerial officer could decide such a question, and thus find out that his process was void for want of jurisdiction in the court which issued it? The maxim *Ignorantia juris non excusat* — ignorance of the law, which every man is presumed to know, does not afford excuse — in its application to human affairs, frequently operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist. For in every case ignorance of the law would be alleged. And consequently the answer must be given in this case, that the ignorance of the officer is of the law, and the rule is almost without an exception, that this does not excuse. It may devolve upon the officer a vast responsibility in some cases, to say that he must notice at his peril that an act of the Legislature attempting to confer jurisdiction upon the courts is unconstitutional. But if the officer does not wish to assume all the hazard which such a rule of law imposes on him, he must require a bond of indemnity from the party for whom he is acting. It is further said that it was the duty of the officer to obey the mandate of the warrant and seize the identical steamboat which he did attach, and that he had no alternative but to obey. If the act which the writ commanded

him to do was a trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction.¹

WEST v. CABELL.

(153 U. S. 78. — 1894.)

GRAY, J. This was an action upon a marshal's bond, in the usual form, the condition of which was that the marshal, by himself and his deputies, should faithfully perform all the duties of his office, and upon which any person injured by a breach of the condition might maintain an action. (Rev. St. §§ 783, 784; *Lammon v. Feusier*, 111 U. S. 17; 4 Sup. Ct. 286.) The breach relied on by Vandy M. West, the plaintiff in this case, was his arrest, against his protest, by a deputy of the marshal, under a warrant issued by a commissioner, commanding the arrest of James West, and not otherwise designating or describing the person to be arrested, upon a complaint of the deputy marshal charging James West with the murder of John Cameron. The defence was that the arrest of the plaintiff under that warrant was lawful. At the trial it appeared that the plaintiff had never been known or called by the name of James West, or by any other name than his own; notwithstanding which, the court, against the objections and exceptions of the plaintiff, admitted oral testimony of the commissioner and of the deputy marshal that the warrant was issued and intended for the arrest of the plaintiff, and instructed the jury that, if they believed that the plaintiff was the man for whose arrest the commissioner issued the warrant, the defendants were not liable for damages on account of the mere fact of arrest.

¹ Cf. *Buck v. Colbath*, 3 Wall. 334; *Elder v. Morrison*, 10 Wend. 128; *Firestone v. Rice*, 71 Mich. 377.

For liability of military and naval officers see *Wilson v. MacKenzie*, 7 Hill. (N. Y.) 95; *Weatherspoon v. Woodby*, 5 Cold. (Tenn.) 149. For liability of sergeant at arms and similar officers, see 1 Pol. Sc. Q. 85; *Kilbourn v. Thompson*, 103 U. S. 168; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463.

By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment; and if, in attempting to make the arrest, the officer is killed, this is only manslaughter in the person whose liberty is invaded. (1 Hale, P. C. 577, 580; 2 Hale, P. C. 112, 114; Fost. Crown Law, 312; 1 East, P. C. 310; 1 Chit. Cr. Law, 39, 40; *Huckle v. Money*, 2 Wils. 205; *Money v. Leach*, 3 Burrows, 1742, 1766, 1767, 1 W. Bl. 555, 561, 562; *Rex v. Hood*, 1 Moody, Crown Cas. 281; *Hoye v. Bush*, 1 Man. & G. 775, 2 Scott, N. R. 86.) Likewise, a warrant of arrest in a civil action, which does not name or describe the person to be arrested, is no justification of the officer. (*Cole v. Hindson*, 6 Term R. 234; *Shadgett v. Clipson*, 8 East, 328; *Finch v. Cocken*, 2 Comp. M. & R. 196, 1 Gale, 130, and 3 Dowl. 678; *Kelly v. Lawrence*, 3 Hurl. & C. 1.)

The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country, a warrant that does not do so will not justify the officer in making the arrest. (*Com. v. Crotty*, 10 Allen, 403; *Griswold v. Sedgwick*, 6 Cow. 456, 1 Wend. 126; *Mead v. Haws*, 7 Cow. 332; *Holley v. Mix*, 3 Wend. 350, 354; *Scott v. Ely*, 4 Wend. 555; *Gurnsey v. Lovell*, 9 Wend. 319; *Melvin v. Fisher*, 8 N. H. 407; *Clark v. Bragdon*, 37 N. H. 562, 565; *Johnston v. Riley*, 13 Ga. 97, 137; *Scheer v. Keown*, 29 Wis. 586; *Rafferty v. People*, 69 Ill. 111.)

In *Com. v. Crotty*, for instance, in which Morris Crotty and others were indicted and convicted for a riot in resisting the arrest of Crotty upon a warrant commanding the arrest of "John Doe or Richard Roe, whose other or true name is to your complainant unknown," the conviction was set aside by the Supreme Judicial Court of Massachusetts, upon the grounds that the warrant was insufficient, illegal and void, because it did not contain Crotty's name, nor any description or designation by which he could be known and identified as the person against whom it was issued, and was, in effect, a general warrant, upon which any other person might as well have been arrested, as

being included in the description; and that: "The warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it. He acted without warrant, and was a trespasser. The defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose." (10 Allen, 404, 405.)

The fourth article of amendment of the Constitution of the United States declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provision of section 1014 of the Revised Statutes, which authorizes an offender against the laws of the United States to be arrested and imprisoned or bailed by a judge of the United States or a commissioner of the Circuit Court in any State where the offender may be found, "and agreeably to the usual mode of process against offenders in such State," is necessarily subordinate to the declaration of the Constitution that all warrants must particularly describe the person to be seized.

In the case at bar, the effect of the rulings and instructions of the court was to give the jury to understand that the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant. For this reason the judgment is reversed, and the case remanded, with directions to set aside the verdict, and to order a new trial.

HERITAGE v. DODGE.

(64 N. H. 297. — 1896.)

TRESPASS for assault and battery.

The plaintiff requested the following instruction: "If the jury find that the plaintiff could not help coughing by reason of a chin-cough, then the defendant was not justified in punishing him, although the defendant believed that the plaintiff coughed for the purpose of defying his authority and disobeying the rules of the school." Refusal and exception. Verdict for defendant.

SMITH, J. The instructions requested made the defendant liable, without regard to the fact whether he exercised reasonable judgment and discretion in determining whether the plaintiff was guilty of intentional misconduct as a scholar. The law clothes the teacher, as it does the parent in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment. . . . He is not required to be infallible in his judgment. He is the judge to determine when and to what extent correction is necessary; and like all others clothed with discretion, he cannot be made personally responsible for error in judgment when he has acted in good faith and without malice. Cooley, Const. Lim. 341; Cooley on Torts, 171, 172, 288; *Lander v. Seaver*, 32 Vt. 114; *State v. Pendergrass*, 2 Dev. & Bat. 365; *Fitzgerald v. Northcote*, 4 F. & F. 656; Reeve Dom. Rel. 288.

Exceptions overruled.

HEWELLETTE v. GEORGE.

(60 Miss. 703. — 1891.)

PLAINTIFF brought the action to recover for personal injuries inflicted by her mother.

WOODS, J. . . . This brings us next to the instructions of the

court touching compensatory damages. By the second instruction asked by plaintiff and refused by the court, and by the instruction given for the defendant, the jury were shut up to return damages, if they found for the plaintiff, not exceeding the actual amount in dollars and cents shown to have been expended by the plaintiff in procuring her release from the insane asylum. It is true that in the instruction given for defendant the jury was told that a recovery might be had for actual damages, but by the second refused instruction of the plaintiff actual damages were held not to include compensation for mental suffering and pain, the sense of humiliation, shame and disgrace, and injury to reputation, inflicted upon and endured by plaintiff. Here was actual damage to the extent of \$200, and actual damage for 11 days of time lost during confinement in the asylum, and to these should have been added damages for mental pain and suffering, shame and mortification, and injury to character. Surely these injuries were real ones, and compensation for these would have been an award of actual damages. Compensatory and actual damages are one, and compensation for wrongs done to one's character is in no sense punitive. We cannot consent that actual damages, in this case, must be confined to the few dollars and cents shown to have been expended by plaintiff to secure her release from the asylum, and that no compensatory damages were awardable for shame and anguish and hurt to character. On this point we are of opinion the action of the trial court was erroneous, and that its judgment must be reversed. We decline, however, to reinstate the verdict of the jury on the first trial, because we are not satisfied as to plaintiff's right to a recovery absolutely. The evidence shows that the plaintiff was the minor daughter of the defendant, who had been married, but who, at the time of the alleged injuries, was separated and living away from her husband. Whether she had resumed her former place in her mother's house, and the relationship, with its reciprocal rights and duties, of a minor child to her parent, does not sufficiently appear. If by her marriage the relation of parent and child had been finally dissolved, in so far as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully main-

tain an action against the parent for personal injuries. But so long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The State, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand. On this very delicate and difficult point in the case the evidence is most unsatisfactory, and for this reason, if for no other, we decline to reinstate the first verdict.

Reversed and remanded.

LOOK v. DEAN.

LOOK v. CHOATE.

(108 Mass. 116.—1871.)

THE *first case* was an action of tort for unlawfully arresting and imprisoning the defendant on two occasions.

CHAPMAN, C. J. The question which this case presents arises upon the defendant's request for instructions, and the instructions that were actually given. The defendant asked the court to rule that if the plaintiff was insane and the defendant, honestly believing that the welfare of the plaintiff demanded that he should go from the crowd to which he was talking to a place of quiet near by, took him forcibly to such place, using no more force than was necessary for the purpose, and acting from no other motive than a desire to assist and protect the plaintiff, such act would not be an assault nor an unlawful arrest or imprisonment. The court declined to give this instruction, but instructed the jury that, if the plaintiff was insane, the officer had a right to

arrest him, but it would in such case be his duty immediately to take proper steps to have him committed to a lunatic hospital, and if he failed to do so he would be liable from the beginning for the arrest. Both the request and the instructions assume that he was neither dangerously insane, nor disturbing the peace, but was merely insane. The defendant was a deputy of the State constable, but his office gave him no authority over the plaintiff. He had only such authority as any private person would have. The right which every citizen has to enjoy personal liberty is necessarily subject to some exceptions. Most of these exceptions are enumerated in *Colby v. Jackson*, 12 N. H. 526, and the authorities there cited. Among them, are the right to restrain a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens, or is so insane as to be dangerous to himself or others. In such cases, the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity. As to insane persons who are not dangerous, they are not liable to be thus arrested or restrained by strangers. (Bac. Ab., Trespass, D; *Anderdon v. Burrows*, 4 C. & P. 210; *Scott v. Wakem*, 3 Fost. & Finl. 328; *Fletcher v. Fletcher*, 28 L. J. N. S. (Q. B.) 134; *In re Oakes*, 8 Law Reporter, 122.) There is no reason why they should be thus liable; for it is well known that many persons who are insane, and especially monomaniacs, are as harmless as any other persons, and are not deemed proper subjects for treatment in a hospital. The request for instructions was properly refused.

* * * * *

The *second case* was an action of tort brought in this court by the same plaintiff against the superintendent of the Taunton Lunatic Hospital for unlawfully confining the plaintiff there during two days.

CHAPMAN, C. J. The defendant was superintendent of the insane hospital at Taunton, and had authority to receive all persons who were legally brought as patients to that institution. The plaintiff was brought there on Saturday, August 21, 1869, by Robert Crossman, a deputy State constable, on a complaint made

by Crossman, and directed to the judge of probate for the county of Bristol, on the day previous, stating that the plaintiff was an insane person and a proper subject for treatment and custody in a State lunatic hospital. One of the selectmen of Rochester, the place of the plaintiff's residence, had in writing acknowledged notice of the complaint and application; and two physicians had signed and sworn to a certificate that within one week previous to the date of the complaint they had made a personal examination of the plaintiff, and after due inquiry and personal examination they were satisfied that he was a fit subject for remedial treatment at the hospital. But it omitted to state that he was insane, and thus failed to be such a certificate as is required by the Stats. of 1862, c. 223, §§ 3, 8, and 1865, c. 268, § 1. The officer took these papers with him to the hospital, but had no warrant. The excuse offered is, that the judge of probate for Bristol, and also the judge of probate for Plymouth, were both absent from the county, and no warrant could be obtained. Crossman desired to leave the plaintiff at the hospital until the following Monday, for the purpose and with the intention to procure the other papers usual in such cases. The assistant superintendent received the plaintiff, believing him to be a fit subject for hospital treatment, and kept him confined till Monday, August 23, when his friends came and took him away. He was within the meaning of the law an insane person, and a proper subject for treatment in the hospital, though not dangerous to himself or the community. The truth of these statements is admitted by the demurrer. The notice issued by the judge of probate on August 28 is immaterial, for it could not have any application to the imprisonment complained of. We look in vain in the statutes for any authority in Crossman to take the plaintiff to the hospital, or to arrest him, without a warrant, even though his purpose was to detain him till he could carry him before the judge of probate, and procure a warrant, as soon as the judge should return home, the plaintiff not being dangerous either to himself or others. The statutes give no authority to arrest harmless persons without a warrant, even for the purpose of bringing them before the judge of probate. And were it otherwise the officer has abandoned all proceedings under the statutes. Being a mere stranger to

the plaintiff, and abandoning the arrest without making any return he had not even the rights that a relative or friend would have. He brought the plaintiff to the hospital tortiously, and no authority could be derived from him for the plaintiff's detention. As the plaintiff was not detained by virtue of the statutes or by any power derived from the common law, all persons concerned in the detention are wrongdoers.

The kindness with which the plaintiff was treated, and the good motives which dictated his detention, should affect the question of damages, but cannot affect his legal right to his personal liberty. He has a right of action against any and all persons who have been concerned in depriving him of it without legal authority. Though the defendant was absent when the plaintiff was brought to the hospital, yet the plea does not state that he was not afterwards present and consenting to the detention till Monday, when the plaintiff's friends came and took him away.

PADMORE v. PILTZ.

(44 Fed. R. 104. — 1890.)

HANFORD, J. This is a suit *in personam* against the master of an American vessel, to recover damages for an assault and battery. The proofs satisfy me that the libellant was employed as steward and cook on board the schooner called the "Robert Searles," and while so employed on a Sunday evening, at the port of Tacoma, in this District, on board of said vessel, the master twice requested this libellant to get him a cup of tea, and, upon said request being defiantly refused, went into the galley, and there violently assaulted the libellant, striking heavy blows upon his head with a wooden belaying pin, from the effects of which the libellant was rendered insensible for a time and quite ill for several weeks, and there is some probability that said injuries may permanently incapacitate him from enduring continuously the fatigue and heat incident to engaging in his profession as cook. The only defence urged on the part

of the master is that he acted within the limits of his lawful authority in chastising the libellant for willful disobedience of lawful commands, and that by accepting payment of the wages due him the libellant has released the master from all claims for damages.

On the facts, I hold that the libellant is entitled to recover as damages such a sum as will compensate him for the injury he received, and as will also in some degree punish the master for his malicious and unwarranted conduct in resorting to extreme violence and use of a dangerous weapon. The claim set up by this master that the law authorized him, at a civilized port, to punish disobedience of a cook by resort to measures only justifiable in case of an emergency and of actual insubordination by a member of the crew at a time of peril at sea, merits rebuke, and I regard it as an aggravation of the original offence. The proofs also clearly establish the libellant's claim for loss of part of his personal effects, which were in the vessel at the time of his injury, and were, in consequence of his inability to remove or secure them after being beaten until he was rendered insensible by the master, lost; the value being \$86.50. . . .

The court therefore awards the libellant damages for the personal injury in the sum of \$1,500, and for loss of property in the further sum of \$86.50, and costs.

SAWYER v. DAVIS.

(136 Mass. 239. — 1894.)

BILL to dissolve or modify an injunction obtained by the present defendants restraining the present plaintiffs from ringing a bell on their mill before 6:30 A.M. After the injunction was granted, the Legislature passed an act as follows: "Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such man

ner and at such hours as the board of aldermen of cities and the selectmen of towns may in writing designate." Later, the selectmen of Plymouth granted to the plaintiffs a written license to ring the bell on their mill, beginning at 5 A.M., in the same manner as before the injunction. The defendants demurred to the bill, on the ground that the statute was unconstitutional so far as applicable to them.

C. ALLEN, J. Nothing is better established than the power of the Legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. (*Bancroft v. Cambridge*, 126 Mass. 438, 441.) In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such a manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property. (*Merrifield v. Worcester*, 110 Mass. 216, 219.) In this conflict of rights police regulations by the Legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good. For example, if, in a neighborhood thickly occupied by dwelling houses, any one, for his own entertainment, or the gratification of a whim, were to cause bells to be rung, and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it

would be an infringement of the rights of the residents, for which they could find ample remedy and vindication in the courts. But if the Legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. (*Bancroft v. Cambridge*, 126 Mass. 441.) It is accordingly held in many cases, and is now a well established rule of law, at least in this Commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the Legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. (*Presbrey v. Old Colony & Newport Railway*, 103 Mass. 1, 6, 7; *Walker v. Old Colony & Newport Railway*, 103 Mass. 10, 14 :

Call v. Allen, 1 Allen, 137; *Commonwealth v. Rumford Chemical Works*, 16 Gray, 231, 233; *Struthers v. Dunkirk, Warren & Pittsburgh Railway*, 87 Penn. St. 282; *Hatch v. Vermont Central Railroad*, 28 Vt. 142, 147; *Brand v. Hammersmith & City Railway*, L. R. 1 Q. B. 130; 2 Q. B. 223; 4 H. L. 1 71; *Vaughan v. Taff Vale Railway*, 5 H. & N. 679, 685, 687; *Rex v. Pease*, 4 B. & Ad. 30; Sedgw. St. & Const. Law, 435, 436.)

The recent case of *Baltimore & Potomac Railroad v. Fifth Baptist Church*, 108 U. S. 317, is strongly relied on by the defendants as an authority in their favor. There are, however, two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority it assumed to build an engine-house and machine-shop close by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable as a place of worship, and it virtually deprived the owners of the use and enjoyment of their property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight though real annoyance, naturally and necessarily resulting in a greater or less degree to all owners of property in the neighborhood from a use of property or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such an owner to relief; but rather that the court expressly waived the expression of an opinion upon the point. . . .

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which shows that the statute relied on as authorizing the plaintiffs to ring their bell (St. 1883, c. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the Legislature to be convenient, if not necessary, for the purpose

of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character, it is not unlike numerous other instances to be found in our statutes, where the Legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference may also be made to the statutes regulating the use of stationary steam-engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables and bowling-alleys.

The defendants, however, contend that a different question arises in the present case, where the plaintiffs rely upon a legislative sanction given to acts after it had been determined by this court that the doing of them was attended with a peculiar injury to the defendants, which entitled them to a remedy as for a nuisance. There can be no doubt that such sanction would be a good defence to an indictment for nuisance; or to a proceeding instituted by an individual, whose only grievance was that he had sustained special damage in consequence of being disturbed in the enjoyment of some public right, such as the right to travel upon a highway or river. His public right may clearly be regulated and controlled by the Legislature, after a decision of the court as well as before. (*Commonwealth v. Essex Co.*, 13 Gray, 239, 247.) But the argument is urged upon us with great force, that in the present case there had been a judicial determination that the ringing of the bell, at the hours now authorized by the terms of the statute and the designation of the selectmen, was a private nuisance to the defendants, not growing out of any public right, and that the statute ought not, as a matter of construction, to be held applicable to this case; or, if such is its necessary construction, that it is unconstitutional, as interfering with their vested rights.

In the first place we can have no doubt that the statute by its just construction is in its terms applicable to the present case. It is undoubtedly true that neither a general authority nor a

particular license is to be so construed as to be held to sanction what was not intended to be sanctioned. A general authority is not necessarily to be treated as a particular license; (*Commonwealth v. Kidder*, 107 Mass. 188;) and in some cases, even where a particular license or authority has been given, as to keep an inn, ale house, or slaughter-house in a particular place, which is specified, this authority has not been deemed to sanction the keeping of it in an improper manner. (*Rex v. Cross*, 2 C. & P. 483; *Commonwealth v. McDonough*, 13 Allen, 581, 584. *State v. Mullikin*, 8 Blackf. 260; *United States v. Elder*, 4 Cranch C. C. 507.) And, ordinarily, a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. In such cases, it is not to be assumed that it was contemplated by the Legislature that what was so authorized would have the necessary effect to create a nuisance, or that it would be done in such a manner as to create a nuisance; and, if a nuisance is created, there will in such cases ordinarily be a remedy at law or in equity. (*Eames v. New England Worsted Co.*, 11 Met. 570; *Haskell v. New Bedford*, 108 Mass. 208, 215; *Commonwealth v. Kidder*, 107 Mass. 188.) But, on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the Legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The Legislature must be deemed to have determined that the benefit is greater than the injury and annoyance; and to have intended to enact that the public must submit to the disturbance, for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered, therefore, in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance.

It is then argued that the Legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly true, so far as such rights have become vested. For example, if the plaintiff under an existing rule of law has a right of action to recover damages, for a past injury suffered by him,

his remedy cannot be cut off by an act of the Legislature. So also, if, in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But, on the other hand, the Legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing law rule on the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge; but, within this limitation, the exercise of the police power of the Legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens; it is indeed in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute; their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell and that afterwards a statute had been passed providing that manufacturers should not ring bells except at such hours as might be approved by the selectmen; and that these manufacturers had then proceeded to ring their bell at other hours, not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

*Demurrer overruled.*¹

¹ In *London, &c., Ry. v. Truman*, (11 App. C. 45,) it is said: "In *Met. Asylum Dist. v. Hill*, (6 App. C. 193,) it was held that the statute authorized the building of a smallpox hospital, if it could be done without creating a nuisance; whereas the railway acts were assumed to establish the proposition that the railway might be made and used whether a nui-

BENNER v. ATLANTIC DREDGING Co.

(134 N. Y. 156. — 1892.)

THIS action was brought to recover damages caused to a house belonging to the plaintiff at Astoria, N. Y., by blasting done by the defendant in the waters of Hell Gate, between January 5, 1887, and April 12, 1888. The complaint alleged that the defendant did "wrongfully and unlawfully so discharge such blasts . . . as to shake, jar, damage, and injure this plaintiff's said dwelling house, . . . and to create a nuisance, and did so maintain such nuisance, and so negligently and carelessly blast such rock, . . . that plaintiff's said dwelling was solely thereby shaken and injured," etc. The defendant pleaded, among other defences, that such blasting "was done and performed under and by virtue of the authority of the United States, and under the direction of the officer of the engineer corps of the United States army in charge of said work; that such operations were a public necessity and requirement, and were duly performed in a lawful and careful manner, and without any default, negligence, or carelessness upon the part of the defendant." Evidence was given upon the trial tending to show that the plaintiff's house, which had been previously injured by explosions, was placed in good repair in November, 1886, and that afterwards, through the blasting operations of the defendant, the foundations, walls, and ceilings were cracked and injured, as alleged in the complaint. The blasting was done by the defendant under a contract dated November 16, 1886, between "Lieut. Col. Walter McFarland, corps of engineers U. S. army, of the first part, and the Atlantic Dredging Co., . . . of the second part."

LANDON, J., (after discussing other points.)

That the defendant's contract was with the United States cannot be questioned upon this appeal. But it is said the author-

sance were created or not." It was accordingly held that the use of a particular place for cattle yards, which without the statute would have been a nuisance, was not actionable, although the statute did not specify that the yards might be located at this place, and it was proved that they might have been so located as not to be a nuisance to householders.

ity of the United States to make the contract must be shown. We know that Congress has exclusive power to regulate commerce, both foreign and interstate, and that the improvement of rivers and arms of the sea forming the highways of such commerce is vested in the United States. (*Wisconsin v. Duluth*, 96 U. S. 379.) Various acts of Congress of which we take judicial notice, since they are the supreme law of the land, appropriated moneys for the improvement of Hell Gate and authorized it. (22 U. S. St. 58, 191; 23 U. S. St. 133, 138; 24 U. S. St. 310, 318.) Other statutes bear upon the subject. The United States is a sovereign nation, with full power over the subject-matter, and may, by statute, provide for the exercise of that power in such legislative meagerness of form as suits itself. If its attempted exercise of power is complete according to its own judicial test, it is complete under ours. The case last cited is an exposition of the power of the United States under similar statutes, and we repose upon its authority. It must be held that the United States was competently authorized to make the contract, and in making it kept within its powers, both as to the subject-matter of the contract and the manner in which it engaged and authorized the defendant to perform it.

The learned trial court charged the jury that, if the explosions conducted by the defendant injured the plaintiff's house, the defendant was liable, irrespective of the question of defendant's negligence; that the question of negligence was not in the case; that, if the business could not be conducted without producing such injury, it must cease. We think this was erroneous. It is entirely clear that the defendant had all the authority of the United States to use all the means contemplated by the contract for the removal of these rocks, provided, always, that he used them carefully; care being a proper regard both to the efficient prosecution of the work and the rights of third persons; the absence of such care being negligence. The instruction of the trial judge eliminates negligence, and assumes proper care. Thus the defendant had the authority of the United States to do the work carefully, and did it within such authority. It being lawful for the sovereign to exercise its lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or

consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy. The government has provided for such direct injuries as amount to a taking of private property for public use, by the constitutional provision that it must not be done without full compensation. If the present were such a case, it would seem that the plaintiff's remedy would be to make the proper application to the government. The defendant, having done no more than it was fully authorized to do, and which its duty to the government under the contract required it to do, would be blameless, and the government liable because of its constitutional obligation. But this is not a case of taking private property, or of direct, but is of consequential, injury. The plaintiff's house was 3000 feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosions. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substances upon them, as in *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Same*, Id. 163; *St. Peter v. Denison*, 58 N. Y. 416; and hence no going outside of the authority actually conferred and conferable, as in those cases. Nor was the work here prosecuted for the benefit of private ownership aided by the public grant of the privilege, as in *Cogswell v. Railroad Co.*, 103 N. Y. 10; and hence the rules applicable to public grants of privileges to private parties or corporations have no force. This work was done under the government, for the government, and in no sense to the detriment of public rights, or to the advantage of the defendant's private ownership. The principles assumed in the case last cited amply support the defendant's position. One cannot confine the vibration of the earth or air within inclosed limits, and hence it must follow that, if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless. The defendant had the authority of the government, and kept within it, and therefore is not liable. (*Radcliff's Ex'rs v. Mayor*, 4 N. Y. 195; *Bellinger v. Railroad Co.*, 23 N. Y. 42; *Marvin v. Iron Min. Co.*, 55 N. Y. 538; *Uline v. Railroad Co.*, 101 N. Y. 98; *Atwater v. Trustees*, 124 N. Y. 602; *Transportation Co. v*

Chicago, 99 U. S. 635 ; *Wood*, Nuis. § 752, quoted with approval in *Seifert v. City of Brooklyn*, 101 N. Y. 145.) . . . The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except VANN, J., dissenting.

STANLEY v. POWELL.

(1891. — 1 Q. B. 88.)

DENMAN, J. This case was tried before me and a special jury at the last Maidstone Summer Assizes.

In the statement of claim the plaintiff alleged that the defendant had negligently and wrongfully and unskillfully fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury: 1. Was the plaintiff injured by a shot from defendant's gun? 2. Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? 3. Damages.

The undisputed facts were, that on November 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings toward an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his

first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back toward the beaters, whereupon the defendant fired his second barrel and killed the bird, but that a shot, glancing from the bough of an oak which was in or close to the hedge, and, striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases — that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, but that, if necessary, the pleadings were deemed to have been amended so as to raise any case or defence open upon the facts with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment; but it was afterward agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that, by no amendment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which

an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain dicta which, until considered with reference to those cases in which they are uttered, seem to support the contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favorable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts, sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year-book 21 Hen. 7, 28 A., which is referred to by Grose, J., in the course of the argument in *Leame v. Bray*, 3 East, 593, to be mentioned presently, in these words: "There is a case put in the year-book, 21 Hen. 7, 28 A., that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year-book, it appears that the passage in question was a mere *dictum* of Rede, who (see 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is unintentional. The words relied on are: "*Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.*" But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be *prima facie* a trespass may be excused.

The next case in order of date relied upon for the plaintiff was *Weaver v. Ward*, Hob. 134, decided in 1607. There is no doubt that that case contains dicta which *per se* would be in favor of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *prima facie* trespasses: "Therefore, no man shall be excused of a trespass . . . except it may be judged utterly without his fault," showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as soldiers of the trainband, and the one, "*casualiter, et per infortunium, et contra voluntatem suam*" (which must be translated "accidentally and involuntarily") shot the other, an action of trespass would lie, unless he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of. The case of *Gibbons v. Pepper*, 4 Mod. 404, decided in 1695, merely decided that a plea showing that an accident caused by a runaway horse was inevitable, was a bad plea in an action of trespass, because, if inevitable, that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment, which show clearly the *ratio decidendi* of that case, are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found not guilty, because in such a case it cannot be said with any color of reason to be a battery in the rider." The more modern cases of *Wakeman v. Robinson*, 1 Bing. 213, and *Hall v. Fearnley*, 3 Q. B. 919, lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of *dictum* in favor of the plaintiff, and the latter may be fairly relied upon by the defendant; for Wightman, J., in his judgment explains *Wakeman v. Robinson*, 1 Bing. 213, thus: "The act of the defendant" (*viz.*, driving the cart at the very edge of a narrow pavement on which

the plaintiff was walking, so as to knock the plaintiff down) “was *prima facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman v. Robinson*, 1 Bing. 213. It was there agreed that an involuntary act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the omission to plead the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover.”

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant.

The case of *Underwood v. Hewson*, 1 Str. 596, decided in 1724, was relied on for the plaintiff. The report is very short. “The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass — *Strange pro defendente*.” The marginal note in Nolan’s edition of 1795, not necessarily Strange’s own composition, is this: “Trespass lies for an accidental hurt;” and in that edition there is a reference to Buller’s N. P., p. 16. On referring to Buller, p. 16, where he is dealing with *Weaver v. Ward*, 14 Jac. 1, Hob. 134, I find he writes as follows: “So (it is not battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter, et per infortunium, et contra voluntatem suam*; for no man shall be excused of a trespass, unless it be justified entirely without his default (*Weaver v. Ward*, 14 Jac. 1, Hob. 134); and therefore it has been holden that an action lay where the plaintiff, standing by to see the defendant uncock his gun, was accidentally wounded. (*Underwood v. Hewson*, T. 10, Geo. 1; *per Fortescue and Raymond in Midd.*, Str. 596.)” On referring back to *Weaver v. Ward*, 14 Jac. 1, Hob. 134, I can

find nothing in the report to show that the court held, that in order to constitute a defence in the case of a trespass it is necessary to show that the act was inevitable. If inevitable, it would seem that there was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver v. Ward*, 14 Jac. 1, Hob. 134, really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."

Day v. Edwards, 5 T. R. 648 (1794), merely decides that where a man negligently drives a cart against the plaintiff's carriage, the injury being committed by the immediate act complained of, the remedy must be trespass and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was *Leame v. Bray*, 3 East, 593. That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway, against the plaintiff's curricule, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was therefore objected for the defendant, that the injury having happened from negligence and not willfully, the proper remedy was by an action on the case, and not of trespass *vi et armis*: and the plaintiff was thereupon nonsuited." On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by Lawrence, J., at page 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might

have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of *Holmes v. Mather*, (L. R., 10 Exch. 261,) and Bramwell, B., in giving judgment in that case, dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful either as being willful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's Abridgment, "Trespass," I, page 706, with a marginal reference to *Weaver v. Ward*, 14 Jac. 1, Hob. 134. In Bacon the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable, even if purposely done to the extent of purposely inflicting the injury, as for instance, in a case of self-defence) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental" (by which I understand "that the injury was unintentional"), "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing

to the defendant's negligence — there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned — and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury believing these facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that if the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action ; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am therefore of opinion that I am bound to give judgment for the defendant. As to costs, they must follow unless the defendant foregoes his right.

Judgment for the defendant.

HAGUE v. WHEELER.

(157 Pa. St. 324. — 1893.)

WILLIAMS, J. The learned judge of the court below was quite right in saying that the questions raised in this case "are of great importance and delicacy, and have never been determined in any court." The production of oil and gas in this State has furnished many questions "of great importance and delicacy" that were new, and required to be considered and determined upon facts that were never dreamed of by the sages of the common law. In the treatment of this case it is a matter of first

importance to get a clear apprehension of the facts on which the questions are raised. There are two plaintiffs who join in the bill, whose interests, while like in kind, are nevertheless several and distinct. There are several defendants, but their interests appear to be joint. The two plaintiffs hold separate leases on parts of tracts in Warren and Foster counties, Nos. 5,202, 5,203, 5,207, and 5,209, aggregating about 2,200 acres. The gas company began drilling on its leases in 1887. Hague began in 1888. Each has a gas well or wells furnishing gas in sufficient volume to enable the owner to utilize it by transportation to and sale in towns in the vicinity. The defendants are owners and lessees of part of tract No. 5,207, which adjoins the lands of the gas company, and is not far from the lands of Hague. In 1890 they drilled a well on their tract, and obtained gas in considerable volume, but not sufficient to enable them to utilize it by transportation and sale. They have therefore allowed it to escape into the open air. The plaintiffs allege that the "geological formation in that locality" is such that the gas-bearing sand rock underlying all these tracts and forming the common reservoir or deposit from which the gas is obtained "is subject to drainage by the drilling of wells on any part thereof." For this reason they assert that "the flow of gas from the said well of defendants is so great that it will, if allowed to go to waste, seriously and irreparably injure the wells of the plaintiffs by drainage from the lands adjoining and near to said defendants' wells. To prevent this they state that they entered on the defendants' land, and at a cost of about \$200 shut in the gas and closed the well. The defendants then threatened to remove the cap or plug and permit the gas to escape again into the air. Upon these facts the plaintiffs asked the court below to enjoin the defendants from removing the cap or plug from the casing or tubing in the well, and from "permitting the gas therefrom to flow into the air, or otherwise go to waste." The injunction was granted, and from that decree this appeal was taken. The affidavits show that the defendants drilled their well in 1890, at the suggestion and request of the gas company, and that negotiations for its purchase by the gas company have been conducted at some length, but without resulting in a bargain. This fact — that the well in controversy had been drilled at con-

siderable cost by the defendants, at the request of the gas company — the learned judge rightly regarded as a significant one. In the opinion filed by him, which is an able one, he says that this fact “might defeat this application so far as the gas company is concerned ;” but he regarded it as of no consequence so far as the other plaintiff was concerned, for he immediately added : “But, as it cannot affect the plaintiff Hague, it is not necessary to consider it at this time.” He then proceeds to state and consider the question on which his decree was based, upon a state of facts such as might arise where an adjoining owner was guilty of malice or negligence in the conduct of operations on his land resulting naturally in injury to his neighbor. But is this conclusion of the learned judge, that Hague stood on higher ground than the gas company, a correct one? The acts complained of were the drilling of the well in 1890, when the wells of both the plaintiffs were in full operation, and the subsequent failure to utilize or shut in the gas. The drilling of the well was accounted for, and the suggestion of malice or negligence therein negatived by proof that it was done at the instance of the gas company. This company had a considerable gas plant, and was engaged in the supply of gas to its customers for fuel. It was interested in the development of the region, and evidently expected to buy the defendants’ well if it was of sufficient size to be capable of utilization. The defendants and the gas company could not agree upon the price of the well after it was drilled, but the fact that it was drilled at the request of the company, and not of the mere motion of the defendants, was an answer to any allegation of malice or negligence on the part of Hague as well as on the part of the company, since it accounted for the act of drilling by assigning a motive therefor, both lawful and neighborly. It will not do to say that an act thus accounted for as to one plaintiff may be assumed to be the result of malice or negligence as to the other, in the absence of proof to sustain the assertion. These plaintiffs stand on common ground. Neither of them can complain of the defendants for the act of drilling the well on their land on any other ground than the existence of malice or negligence. When the act is accounted for in such a manner as to show that it was not done with malice, or in negligence, but in good faith, as an act of

ownership, and at the solicitation of the gas company, the character of the act is established, and as a basis of relief it falls out of the case. What have we then? Three landowners owning considerable holdings in the same basin, or overlying the same gas-bearing sand rock, each having an open gas well or wells on his land, drilled without malice or negligence, in a lawful manner, and for a lawful purpose. Two of these owners have been able to utilize the gas from their respective lands and find a market for it. One of them has not been so fortunate. He has gas from his well, but up to the time of the filing of this bill he has not been able to utilize or dispose of it, and his gas has gone to waste for that reason. His more fortunate neighbors come into a court of equity, and ask that he shall not be permitted to let his gas run, because, while this gas is his own, underlying his tract, and finding its way to the surface through his well, it has a tendency to drain the sand rock, and so to reduce ultimately the flow of gas from their wells. This would be equally true if the defendants were able to utilize their gas; yet it is conceded that in that case their right to the gas from their well would be as incontestable as the right of the plaintiffs to use the gas from theirs. How is that right lost? By their inability to find a purchaser? If they can find a purchaser, or turn the gas to any useful purpose, their right to the gas that flows from their well is conceded. If they cannot, their right is denied. Their well must be shut in, while their successful neighbors drain the entire basin through their open wells, and receive pay for the gas. This is a proposition to limit the power of the owner over his own by the use he is able to make of it. If he can sell his gas or his oil, or turn it to some practical purpose, his power over it as owner is unabridged. If he cannot find a purchaser, or a practical purpose to which to apply his yield of gas or oil, then his power as owner is gone. This would be an adaptation to actual business of the spiritual truth that "to him that hath shall be given; but from him that hath not shall be taken away even that which he seemeth to have."

Does the maxim, "*sic utere tuo ut alienum non lædas*," require us to grant the relief sought in this case? If in burning the gas from their well the defendants should direct the jet towards the

plaintiffs' buildings or timber, or should leave it uncontrolled, so that the wind might drive it against or towards the plaintiffs' property so as to injure or endanger it, a case would be presented in which the maxim would be applicable, and we should take pleasure in enforcing it. If the defendants' well produced nothing, and they were leaving it without plugging, so that the water might find its way into the sand rock, to the injury of others, we could punish them under the statute which prescribes the manner of plugging an unproductive well, and makes it obligatory on the owner to adopt it. But we have a well drilled for a lawful purpose, in a lawful manner, and actually producing gas, which is not directed towards the property of another, or so consumed as to affect the buildings, timber, or crops of any adjoining owner. It is therefore not the use of the gas of which the plaintiffs complain. It is the production of it when the owner cannot sell it or turn it to any practical purpose. Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells, but it is not the public interest that is involved in this litigation. It is the interest of an adjoining owner who seeks to appropriate to himself so much of his neighbor's gas as he cannot turn into money or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands by an injunction until this appropriation is accomplished. We cannot find any rule of law or any principle of equity on which such an injunction can rest. The scope of the golden rule may be sufficiently ample to cover this case, and it may be that it would require an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage, if his neighbor was so situated that he could profit by it. Assuming this to be so, the moral obligation so arising is not enforceable by civil process. The owner of timber may pile it in heaps, and burn it, as was done in the early settlement of the country, notwithstanding the fact that his neighbor has a sawmill and all the facilities for preparing the sawed lumber for market and converting it into money. The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability

to market it. An owner of land may have a deposit of coal under some portion of it so small in extent, or with such an inclination, as to make it impossible for him to mine through his own tract without a greater cost to him than the value of the mined coal when brought to the surface. His neighbor may have an open mine that reaches it, and through which it could be brought at a fair profit. These circumstances do not affect the title of the owner of the coal, or confer any right on the adjoining mine owner; but it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices in the sand rocks in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner, to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner, and with the same results. He cannot estimate the quantity in place of gas or oil, as he might of the solid minerals. He cannot prevent its movement away from him, towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations: he must not disregard his obligations to the public, he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power

as an owner is absolute, until the Legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.

*The decree of the court below is reversed, and the injunction is dissolved.*¹

MOGUL STEAMSHIP CO. v. MCGREGOR, GOW & CO.

(1892. — Appeal Cases 25.)

THE defendants are firms and companies owning steam vessels which ply regularly, during the whole year, some of them on the Great River of China between Hankow and Shanghai, and others between Shanghai and European ports. The plaintiffs are a ship-owning company, not maintaining a regular service either on the Great River or between Europe and Hankow, but sending vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade. The defendants entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the plaintiffs and other outsiders from obtaining a share of the trade. The means used were: firstly, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete

¹ In *Rideout v. Knox*, (148 Mass. 368,) Holmes, J., says: "At common law a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only." A different view is taken by some courts. In *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838, it was held by a divided court that a fence erected on defendant's land for the sole purpose of shutting out the light and air from plaintiff's premises, was a nuisance, although it was admitted that defendant might have erected houses or useful or ornamental structures as near to plaintiff's land as the fence was, even though the consequent damage would have been greater than that caused by the fence. Morse, J., declares: "I do not think the common law permits a man to be deprived of water, air, or light for the mere gratification of malice."

with the plaintiffs' ships; thirdly, the lowering of freights; fourthly, the indemnifying other vessels that would compete with the plaintiffs'; fifthly, the dismissal of agents who were acting for them and the plaintiffs.

LORD HALSBURY, L. C. An associated body of traders endeavor to get the whole of a limited trade into their own hands by offering exceptional and very favorable terms to customers who will deal exclusively with them; so favorable that but for the object of keeping the trade to themselves they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves. I do not think that I have omitted a single fact upon which the appellants rely to show that this course of dealing is unlawful and constitutes an indictable conspiracy.

Now it is not denied and cannot be even argued that *prima facie* a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice." This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber, (*Hilton v. Eckersley*, 6 E. & B. at pp. 74, 75,) and no authority, indeed no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law." Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful.

There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyzes what is the real meaning of such phrases it is manifest that all that is

intended to be implied by them is that any rival trading which shall be started against the association will be rendered unprofitable by the more favorable terms,—that is to say, the reduced freights, discounts, and the like which will be given to customers who will exclusively trade with the associated body. And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade yourself. If such an injury, and the motive of its infliction, is examined and tested upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful, a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.

The learned counsel who argued the case for the appellants with their usual force and ability, were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation, or interference was proved against the associated body of traders, and as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful. The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders, would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by "out of the ordinary course of trade?" I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself. I entirely adopt and make my own what was said by Lord Justice Bowen

in the court below:—“All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary ‘normal’ standard of freights or prices, or that law courts had a right to say to them in respect to their competitive tariffs, ‘Thus far shalt thou go, and no further.’”

Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellants’ interests.

I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice’s criticism, 21 Q. B. D. 551 (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend Lord Bramwell in *Reg. v. Druitt*, 10 Cox, C. C. 592, if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanor, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition. But in this case the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a

person who singly trades for his own benefit and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections.

The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction) would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with the independent traders; and if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defence that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly though, I think, somewhat inaccurately used. There are some contracts to which law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade; and contracts so tainted, the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word "unlawful," which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as *contrary to law*, is not applicable to such contracts. It has never been held that a contract in restraint of trade is contrary to law in the sense I have indicated. A judge in very early times expressed great indignation at such a contract; and Mr. Justice Crompton undoubtedly did say (in a case where such an observation

was wholly unnecessary to the decision and therefore manifestly obiter) the parties to a contract in restraint of trade would be indictable. I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.

In the result, I think that no case was made out of a conspiracy such as the appellants here undertook to establish; and it is not unimportant, for the reasons I have given to see what is the conspiracy alleged in the statement of claim. The first paragraph alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful, but as I have already said in proof there is nothing but the competition with which I have dealt.

The second paragraph alleges that in pursuance of the conspiracy people were "bribed, coerced, and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs." If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word "bribed" is robbed of any legal significance. "Coerced" is not justified by any evidence in the case and the word "induced" is absolutely neutral, and no unlawful inducement is proved. The third paragraph uses language such as "intention to injure the plaintiffs," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether if the indictment had set out the facts without using the ambiguous language to which I have referred in the statement of claim, it would have disclosed an indictable offence? I am very clearly of opinion it would not.

I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of opinion that it is not.

I think, therefore, that the appeal ought to be dismissed with costs, and I so move Your Lordships.

Concurring opinions were delivered by Lords Watson, Bramwell, Morris, Field and Hannen.¹

FITZGERALD *v.* CONN. RIVER PAPER Co.

(155 Mass. 155. — 1891.)

ACTION for injuries sustained by falling down the icy steps of defendant's mill. Plaintiff was nonsuited and alleged exceptions.

KNOWLTON, J. There was evidence proper for the consideration of the jury on the question whether the defendant corporation was negligent in permitting the steps on which the plaintiff was injured to be slippery and dangerous. It was its duty to provide on its premises a reasonably safe passageway for the use of its employees in going to and from their work; . . . and it was a question of fact for the jury whether the plaintiff was in the exercise of due care in trying to go down the steps as she did at the time of the accident. The fact that she knew them to be icy, and more or less slippery and dangerous, does not require us to hold as a matter of law that she was negligent in trying to go down them, holding by the rail, especially if she had no other way of getting from the mill. The ground on which the ruling for the defendant was made was doubtless that the plaintiff, knowing the icy condition of the steps, assumed the risk of accident, and thereby precluded herself from recovering. It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary under-

¹ Cf. *Jackson v. Stanfield*, 36 N. E. 345, (Ind. 1894,) conspiracy of retail lumber dealers to prevent wholesalers from selling to those who are not members of the combination held actionable.

taking, and it comes within a principle which has a much broader application, and which is expressed in the maxim, *volenti non fit injuria*. The reason on which it is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is. In the present case it does not appear that the steps were icy, or that there was any reason to suppose that the business involved a risk in regard to them, when the plaintiff entered the defendant's service. It cannot be held that when she made her contract she assumed the risk of such an injury as she afterwards received. We therefore come to the question whether, by her conduct since, she has assumed such a risk.

The doctrine, *volenti non fit injuria*, has not been very much discussed in the cases in this Commonwealth, but it is well established in the law, and it has been repeatedly recognized by this court. (*Horton v. Ipswich*, 12 Cush. 488, and other cases.) In England it has been much discussed, and the difficulties in the application of it have frequently been considered by the courts. The rule of law, briefly stated, is this: One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. It has often been assumed that the conduct of the plaintiff in such a case shows conclusively that he is not in the exercise of due care. Sometimes it is said that the defendant no longer owes him any duty; sometimes that the duty becomes one of imperfect obligation, and is not recognized in law. In one form or another the doctrine is given effect, as showing that, in a case to which it applies, there is either no negligence towards the plaintiff on the part of the defendant, or a want of due care on the part of the plaintiff. In *Thomas v. Quartermaine*, 18 Q. B. Div. 685, Bowen, L. J., says: "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger and voluntarily run the risk." It would be unjust that one who freely and voluntarily assumes a known risk for which another is, in

a general sense, culpably responsible, should hold that other responsible in damages for the consequences of his own exposure. . . . It may be said that the voluntary conduct of the plaintiff in exposing himself to a known and appreciated risk is the interposition of an act which, as between the parties, makes the defendant's act, in its aspect as negligent, no longer the proximate cause of the injury ; or, at least, is such participation in the defendant's conduct as to preclude the plaintiff from recovering on the ground of the defendant's negligence. Certainly it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that the plaintiff is not negligent in voluntarily exposing himself when he understands the danger. It is to be remembered that, in determining whether a defendant is negligent in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he cannot recover, and should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself, and find that it was reasonably careful. But this principle applies only when the plaintiff has voluntarily assumed the risk. As is said by Bowen, L. J., in *Thomas v. Quartermaine*, *supra*, the maxim is not *scienti non fit injuria*, but *volenti non fit injuria*. The chief practical difficulty in applying it is in determining when the risk is assumed voluntarily. In the first place, one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. Sometimes the circumstances may show as a matter of law that the risk is understood and appreciated, and often they may present in that particular a question of fact for the jury.

What constraint, exigency, or excuse will deprive an act of its voluntary character when one intentionally exposes himself

to a known risk is a question about which learned judges differ in opinion. It has been held by some that where a man is not physically constrained, where he can take his option to do a thing or not to do it, and does it, he must be held to do it voluntarily. See opinion of Lord Bramwell in *Membery v. Railway Co.*, L. R. 14 App. Cas. 179, and the dissenting opinion in *Eckert v. Railroad Co.*, 43 N. Y. 502. But by the authorities generally, one who in an exigency reluctantly determines to take a risk is not held so strictly. There has been much difference among the English judges in regard to the question whether a servant who discovers a defect in machinery, not existing when he entered the service, which the master is bound to repair, and who works on, understanding the danger, rather than to lose his place by complaining of it or refusing to work until it is repaired, shall be held to have voluntarily assumed the risk. In *Membery v. Railway Co.*, *supra*, Lord Bramwell expresses the opinion that the plaintiff cannot recover in such a case, while the Lord Chancellor and Lord Herschell, without expressing an opinion, prefer to keep the question open for future consideration. In *Thrussell v. Handyside*, 20 Q. B. Div. 359, the Court of Queen's Bench holds that a workman, by continuing to work under such circumstances, does not voluntarily assume the risk; and in *Yarmouth v. France*, 19 Q. B. Div. 647, a majority of the Court of Appeals are of the same opinion. . . . In *Goodnow v. Mills*, 146 Mass. 261, it is said that "there was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by or apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it." . . . In this Commonwealth, as well as elsewhere, plaintiffs have been precluded from recovering, alike where their assumption of the risk grew out of an implied contract in reference to the condition of things at the time of entering the defendant's service, and where they voluntarily assumed a risk which came into existence afterwards. (*Moulton v. Gage*, 138 Mass. 390, and other cases.) . . . Whether the fear of losing one's situation would constitute such an exigency, where the place had become dangerous by reason of the negligence of the employer to repair it, especially if notice of the danger had been given by the servant, and there had been a promise speedily to

repair it, we need not decide in this case. (See *Leary v. Railroad*, 139 Mass. 580; *Haley v. Case*, 142 Mass. 316.)

We are of opinion that it cannot be said as a matter of law that the plaintiff in the present case, in attempting to go down the steps, voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them. But the evidence tended to show that their condition in regard to slipperiness was constantly changing in different states of the weather, with the spray falling daily from steam-pipes and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. If it were certain that the extent of the danger was obvious to one who saw the surface of the steps, the case would be different. Besides, there was evidence tending to show that she had no way of leaving the defendant's mill except by going down the steps, and that was important to be considered in deciding whether she took the risk voluntarily. *Osborne v. Railroad Co.*, 21 Q. B. Div. 220, a case in which the plaintiff sued to recover for an injury received in going down some icy stone steps, is precisely in point. It is said in the opinion, referring to the language of the justices in *Yarmouth v. France*, and *Thomas v. Quartermaine*, *supra*, that "those observations go far to make it hard for a defendant to succeed on such a defence as that relied on here; for it is probable that juries would find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk. But that cannot be helped. . . . These judgments introduce an important qualification of the maxim, *volenti non fit injuria*. In the present case the plaintiff may well have misapprehended the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow." We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

EVANS v. WAITE.

(83 Wis. 286. — 1892.)

It is charged in the complaint that "on July 4, 1891, while the plaintiff was lawfully riding on horseback on the public highway, in company with defendant, the defendant, being then and there armed with a revolver loaded with powder and leaden ball, negligently and carelessly discharged the said revolver so that the ball therefrom struck the plaintiff in the hip, and passed on through the flesh into his thigh, where it became lodged and imbedded so that it was impracticable to remove the same, and that the said ball so fired from the revolver in the hands of the defendant caused a deep, painful, and dangerous wound." It is further alleged that the defendant is a minor of about the age of 18 years. The defendant answered by his guardian: (1) A general denial; and (2) that the plaintiff was guilty of contributory negligence, in that he enticed the defendant to go with him for the purpose of shooting, and that while the parties were shooting the plaintiff was accidentally injured, and not through any negligence of the defendant. On the trial it was proved that the defendant was a minor; that on the occasion mentioned in the pleadings he was armed with a revolver; and that the plaintiff was wounded, as charged in the complaint, by a bullet discharged from the revolver, by accident, when in the hands of the defendant. The circuit judge held that, because the defendant was a minor, and was armed with a revolver, in violation of chapter 329, Laws 1883, (Sanb. & B. Ann. St. § 4397 b,) he was liable to the plaintiff for the injury, without regard to the question of negligence. Thereupon the jury were instructed to find for the plaintiff, and to assess damages for the injury. The court confined the recovery to compensatory damages. The jury assessed plaintiff's damages at \$375, nearly \$150 of which was for actual necessary expenses incurred by the plaintiff, and for loss of time, by reason of the injury. A motion for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

LYON, C. J. In *Shay v. Thompson*, 59 Wis. 540, it was held that if two persons, by mutual consent, in anger, fight together, each is liable to the other for actual damages. The fighting being unlawful, the consent of either party is no bar to the action. The authorities upon which the decision is based are cited in the opinion. The rule of that case applies here. It was unlawful for the defendant to be armed with a revolver when the plaintiff was injured, and hence he is liable for any injury inflicted by him with such weapon. It is immaterial that the plaintiff was consenting to the defendant being so armed, and to his use of the revolver. Such is the rule of *Shay v. Thompson*. The only effect of such consent was to confine the recovery to compensatory damages, and it was so restricted. The question of negligence is also immaterial. True, the complaint charges that the defendant was negligent, but it also contains a sufficient statement of a cause of action based upon the fact that the defendant was unlawfully armed with the revolver with which he wounded the plaintiff. . . . We fail to find any error disclosed in the record.

The judgment of the Circuit Court must be affirmed.

SOANLON v. WEDGER; BURNHAM v. SAME; MASON v. SAME;
AR FOON v. SAME.

(156 Mass. 462. — 1892.)

ALLEN, J. The several plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in Broadway square, which was a public highway in Chelsea. This display was made by the defendant Wedger, who acted under a license from the mayor and aldermen of Chelsea for a display of fireworks in Broadway square on that evening, under Pub. St. c. 102, § 55. A verdict was returned for the defendant, and the jury made a special finding that the defendant, in firing the bomb, exercised reasonable care. The case comes to us on a report, which states that if, on the facts contained therein, and

on said finding, the plaintiffs are entitled to recover, the case is to be remitted to the Superior Court for the assessment of damages; otherwise judgments are to be entered for the defendant. It is therefore to be considered whether it appears affirmatively that the plaintiffs were entitled to recover.

The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travellers upon the highway, or that they were unaware of the nature and risk of the display. The report says: "A considerable number of persons were attracted to said square by said meeting, and said bombs and other fireworks which were being exploded there. A portion of the center of the square about 40 by 60 feet was roped off by the police of said Chelsea, and said bombs or shells were fired off within the space so inclosed, and no spectators were allowed to be within said inclosure. . . . The plaintiffs were lawfully in said highway at the time of the explosion of said mortar, and near said ropes, and were in the exercise of due care." The bombs or shells are described in the report, and they were to be thrown from mortars into the air, it being intended that they should explode in the air, and display colored lights. They were apparently a common form of fireworks, such as has long been in use. The ground on which the plaintiffs place their several cases is that Pub. St. c. 102, § 55, did not authorize the mayor and aldermen of Chelsea to license the firing of anything but rockets, crackers, squibs, or serpents, and that, therefore, the act of the defendant in firing bombs or shells was unauthorized and unlawful. It is not contended that it was at the time supposed either by the defendant or by anybody else that the license was insufficient to warrant the display which was actually made. The licensee was the chairman of a committee which had a political meeting in charge, and the defendant acted at the request of the committee, and was directed by them as to when and where to fire off the fireworks. Under this state of things, it must be considered that the plaintiffs were content to abide the chance of

personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveller upon the highway had been injured, different reasons would be applicable. (*Vosburg v. Moak*, 1 Cush. 453; *Jenne v. Sutton*, 43 N. J. Law, 257; *Conradt v. Clauve*, 93 Ind. 476.) But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk. (See Poll. Torts, 138-144.) In the opinion of a majority of the court, the entry must be, judgments for the defendant.

MORTON, J. I dissent from the opinion of the majority of the court. The majority regard as immaterial the question whether the license was valid or not. It may be treated therefore, as void, as I think it was. If it was void, then the defendant, Wedger, was using the highway for a purpose that was dangerous, unlawful, wrongful, and unjustifiable as against anybody lawfully in the highway and in the exercise of due care, as it is expressly found that the plaintiffs were, and is liable for any injury caused to them by the explosion, whether they were travellers or not, unless they participated or aided in the display, or contributed by their own conduct to their injuries, or assumed the risk of injury. It is not claimed that there is any evidence that they participated or aided in the display. There is no evidence that they were guilty of contributory negligence. It is said, however, that they assumed the risk. What are the facts? Merely that a political meeting was being held in the square, to which a considerable number of persons had been attracted, and that bombs and other fireworks were being discharged there; and that at the time of the explosion the plaintiffs were near the rope that inclosed the space that had been roped off for discharging the fireworks, but were lawfully there, and in the exercise of due care. There is no evidence that they knew or had any reason to suppose that such mortars were liable to explode and injure bystanders, or that they were familiar with their construction, or the manner in which they were fired, or were aware that the bombs were

charged with an explosive more powerful than ordinary gunpowder. There is nothing to show that they had any knowledge or suspicion that they were incurring any risk by being where they were. An inference or a conclusion that they were not unaware of the risk rests, it seems to me, entirely on assumption. The most that can be said of them is that they were voluntary spectators of the display. But before they can be held to have assumed the risk, it must appear that they knew all the facts material to the risk, and appreciated and understood it. (Citing cases.) It is carrying the doctrine of assumption of the risk further than I think it has ever been carried to say that one who, being lawfully on the highway, and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the risk. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he, and not the spectators, assumes the risk of injury. It is of no consequence that the defendant exercised reasonable care in firing the bomb. It is a contradiction of terms to say of one engaged in an unlawful, dangerous, wrongful, and unjustifiable business that he used due care in it. Due care is predicated of something which a person may lawfully do, but which by his negligent manner of doing it may become injurious to others; not of something which he has no right whatever to do. Further, the question of assumption of the risk is ordinarily one of fact for the jury. (Cases *supra*.) The plaintiffs are not bound to show that they did not assume the risk. Unless it appears that they did, they are entitled to recover. This court cannot say as matter of law upon the facts stated that the plaintiffs assumed the risk. Nothing is disclosed as to the circumstances under which the plaintiffs were present. For aught that appears, they might have been travellers stopping for a moment on their way through the square, or detained by the crowd. It is difficult to see what the plaintiffs' supposition (if they did suppose it) that the exhibition was a lawful one had to do with their assumption of the risk; and still more difficult to see it if the exhibition was, as it proved to be, unlawful. I understand the question submitted to this court by the report to be whether,

upon the facts therein stated, and upon the finding of the jury as to reasonable care on the part of Wedger, the plaintiffs were entitled to recover. I think they were, and that no other conclusion is warranted on principle or by authority. (*Vosburgh v. Moak*, 1 Cush. 453; *Cole v. Fisher*, 11 Mass. 137; *Moody v. Ward*, 13 Mass. 299; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, Id. 84; *Cohen v. Mayor, etc.*, 113 N. Y. 532; *Jenne v. Sutton*, 43 N. J. Law. 257; *Fletcher v. Rylands*, L. R. 1 Exch. 265, 279, *et seq.* . . . I think, therefore, that, in accordance with the terms of the report, the entry should be, cases remitted to the Superior Court for the assessment of damages.

KNOWLTON, J., concurs in this opinion.

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TURNER v. NORTH CAROLINA RY.

(63 N. C. 522. — 1899.)

READE, J. The court in which the plaintiff seeks redress for an alleged injury, is a court of the government of one of the States of the United States. The plaintiff was engaged in a Rebellion against the government of the United States, and having for a time absented himself from the service of the Rebellion he contracted with the defendant to convey him to the field of active operations, that he might report for such service again; and he complains that the defendant was guilty of negligence in transporting him, and that thereby he was damaged; and thereupon he asks that the court will enforce his claim, and help him to redress.

If the Rebellion had been successful and a government had been founded upon that success, it would doubtless have been legitimate for the courts of such government to adjust the rights of those who had been engaged as its agents in establishing the government. But will the court of the government which was attempted to be destroyed, interfere to redress one of the

insurgents who was disabled in the very act of hostility to the government whose aid he now seeks? If the defendant, who is alleged to have committed the injury, was a friend of the United States, it would seem to be an ungenerous discrimination to subject him to damages for an act of which his government had the benefit; and if the defendant was a co-rebel with the plaintiff, and they were *in pari delicto*, the government would consult its dignity, and not interfere in their dispute.

But this must be understood to be restricted to acts clearly rebellious, or intimately connected with the Rebellion, and in aid of it; for, very clearly, the present courts will take cognizance of all matters of a civil nature between rebels, not intimately connected with and in aid of the Rebellion. In the view of the courts of the present government, the service in which the plaintiff was engaged was illegal. The act of going to the field of operations was illegal, and the contract of the defendant to aid him by carrying him to the field, was an illegal contract, and upon the supposition that both parties were rebels—the most favorable one for the plaintiff—there can be no recovery upon it. (*Martin v. McMillan, ante, 468.*)

The object was properly taken on the plea of the general issue. There is no error.

NOTE. As some misapprehension exists as to the extent of the principle administered by the presiding judge upon the trial of the case, below, the Reporter adds that during the same term of Alleman Court, in the case of *Ireland v. The N. C. R. R. Company*, (being a suit for damages occasioned by the same negligence that injured the plaintiff in the case above,) the plaintiff, who was also shown to be an officer of the Confederate States army, under the instruction of his Honor recovered a verdict for \$2,000, the defendant having failed to show that *he* was then going in order to report to General Johnston; also that at the term, in the case of *Clark, Adm'r, etc., v. The Raleigh & Gaston R. R. Company*, it was shown that the intestate was an officer of the Confederate States army at home on furlough, and that he was killed by the negligence of officials of the defendant, whilst returning home from a visit of friends.

Under the instruction of his Honor, the plaintiff recovered a verdict for \$3,000.

All these cases were conducted by the same counsel.¹

¹ *Wallace v. Cannon*, 38 Ga. 199, *accord*. The author of an immoral book, though it is copyrighted, cannot maintain an action against a pirating publisher, as the law recognizes no property rights in such a production. (*Stockdale v. Onwhyn*, 5 B. & C. 173; 2 Car. & P. 163; *Lawrence v. Smith*, Jacob, 471 and cases in note; *Cf. Stallings v. Owen*, 51 Ill. 92.) "The true view is believed to be, that, where one is seeking the help of the court in doing a wrongful thing, or compensation for having done it, or redress for another's having participated with him in it, or where in any other manner compliance with his prayer would involve an affirmance of his wrong as though it were a right, his suit will be rejected." (Bishop's Non-Contract Law, § 59.)

CHAPTER V.

REMEDIES: DAMAGES.

BLODGETT v. STONE.

(60 N. H. 167. — 1880.)

CASE, for diverting the water of a natural stream from the plaintiff's aqueduct. The defendant offered a brief statement alleging that the plaintiff had previously filed a bill in equity for an injunction against the defendant, based substantially on the facts now stated in his declaration, upon which an application for a temporary injunction had been denied after a full hearing of the facts before one of the justices of the court, and the equity suit had been entered "neither party," after the defendant had filed an answer denying the equity of the bill. No replication was filed, and no decree was ever entered up. The brief statement was rejected, and the defendant excepted. The defendant requested the following instructions to the jury, which the court declined to give, and the defendant excepted: "If the jury find that what Stone did was done from malice, still he is not liable unless his act caused actual damages to the plaintiff, and then only for the actual damages caused to the plaintiff, and the verdict in that case would settle nothing as to the legal rights of the parties." Verdict for the plaintiff.

Ladd & Fletcher for the defendant.

Ray, Drew & Heywood for the plaintiff.

CLARK, J. The facts stated in the brief statement constituted no defence, and it was properly rejected. The proceedings in the bill in equity were immaterial. No decree was entered

up. If the judge who heard the application for a temporary injunction denied it on the merits, it would not be a bar to a subsequent hearing on the bill, and it is no bar to this suit. The request for instructions, that the defendant was not liable unless his act caused actual damage to the plaintiff, was rightly refused. The plaintiff was entitled to a verdict for nominal damages upon proof of the infringement of his right, although no actual injury was shown. (*Tillotson v. Smith*, 32 N. H. 90; *Bassett v. Company*, 28 N. H. 438; *Woodman v. Tufts*, 9 N. H. 88; *Munroe v. Stickney*, 48 Me. 462; *Chaffee v. Pease*, 10 Allen, 537; *Stowell v. Lincoln*, 11 Gray, 434.)

Judgment on the verdict.

RICHARDS v. SANDFORD.

(2 E. D. Smith, 349 : Common Pleas. — 1854.)

C. Bainbridge Smith for the plaintiff.

Stephen P. Nash for the defendant.

By the court. WOODRUFF, J. An appeal is made from an order at special term denying the plaintiff's motion for a new trial, and we are urged to reverse that order upon two grounds; first, because irrelevant and inadmissible testimony was given on the part of the defendant; and secondly, because the damages are grossly inadequate to the injury sustained by the plaintiff, through the culpable negligence of the defendant.

* * * * *

But upon the second ground, I think a new trial should be ordered. The action is brought to recover damages sustained by the plaintiff, in falling over stones left upon the sidewalk in a dark night, in front of the defendant's premises, by which one of his teeth was broken out, and his face otherwise cut and bruised. Under a charge from the court, to which there was no exception, and which, though not contained in the case as settled, we must assume to have been correct, the jury have found that this injury was sustained by the culpable negligence of the defendant, without fault on the part of the

plaintiff, and I think they were warranted by the evidence in so finding. And for this injury the jury award to the plaintiff ten dollars damages only.

I fully agree that the general rule is, that in actions for torts, in which the rule of damages is not fixed by any definite ascertained rule, a new trial is not to be granted because the court think the damages either too great or too small. But this general rule is clearly open to exception, alike applying to excessiveness and inadequacy of damages. In the language of the court, in *Collins v. The Albany and Schenectady Railroad Company*, "Where the damages found by the jury are either so large or so small as to force upon the mind of every man, familiar with the circumstances of the case, the conviction, that by some means the jury have acted under the influence of a perverted judgment, it is the duty of the court, in the exercise of a sound judicial discretion, to grant a new trial."

Such, in my judgment, is the character of the present verdict. It cannot be reconciled in any manner with an honest and intelligent purpose to give the plaintiff an indemnity for the injury received. It leaves the plaintiff to pay the costs of the litigation. The case did not call for exemplary damages, but a just indemnity was due to the plaintiff; and though there is no precise standard by which such indemnity can be measured, it seems to me a mockery of justice to call this verdict indemnity in any sense.

The case above referred to, from 12 Barb. 492, and the cases there collected, seem to me to present the true rule on this subject, and to call for our interposition.

On the other hand, I think the defendant should be permitted to avoid a new trial, as in that case, and in *Armstrong v. Haley*, 4 Q. B. R. 917, by consenting to a modification of the verdict. If, therefore, he thinks proper to consent that the verdict be raised to one hundred dollars, judgment should be ordered for the plaintiff for that sum, and costs of suit, and a new trial be denied without costs of appeal. The order at special term should, I think, be modified in conformity with these views, and in default of such consent, a new trial should be ordered, on payment of costs.

Ordered accordingly.

EXEMPLARY DAMAGES.

MIL. & C. RY. CO. v. ARMS ET AL.

(91 U. S. 489. — 1875.)

ERROR to the Circuit Court of the United States for the District of Iowa.

This action against the railroad company to recover damages for injuries received by Mrs. Arms, by reason of a collision of a train of cars with another train, resulted in a verdict and judgment for \$4000. The company sued out this writ of error.

The bill of exceptions disclosed this state of facts: Mrs. Arms, in October, 1870, was a passenger on defendant's train of cars, which, while running at a speed of fourteen or fifteen miles an hour, collided with another train moving in an opposite direction on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision, and the cause of it; but there was evidence tending to show that Mrs. Arms was thrown from her seat, and sustained the injuries of which she complained. After the evidence had been submitted to the jury, the court gave them the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages."

Mr. John W. Cary for the plaintiff in error.

Mr. C. C. Nourse for the defendants in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

The court doubtless assumed, in its instructions to the jury, that the mere collision of two railroad trains is, *ipso facto*, evidence of gross negligence on the part of the employees of the company, justifying the assessment of exemplary damages;

for a collision could not well occur under less aggravated circumstances, or cause slighter injury. Neither train was thrown from the track, and the effect of the collision was only to demolish the fronts of the two locomotives. It did not even produce the "shock" which usually results from a serious collision. The train on which Mrs. Arms was riding ~~was~~ moving at a very moderate rate of speed; and the other train must have been nearly, if not quite, stationary. There was nothing, therefore, save the fact that a collision happened, upon which to charge negligence upon the company. This was enough to entitle Mrs. Arms to full compensatory damages; but the inquiry is, whether the jury had a right to go farther, and give exemplary damages.

It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a general rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea, that compensation alone is the true measure of redress.

But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the States of this country. (1 Redf. on Railw. 576; Sedg. on measure of Dam. 4th ed. ch. 18 and note, where the cases are collected and reviewed.) It has also received the sanction of this court. Discussed and recognized in *Day v. Woodworth*, 13 How. 371, it was more accurately stated in *The Philadelphia, Wilmington & Baltimore R. R. Company v. Quigley*, 21 How. 213. One of the errors assigned was that the Circuit Court did not place any limit on the power of the jury to give exemplary damages, if

in their opinion they were called for. Mr. Justice Campbell, who delivered the opinion of the court, said:

“In *Day v. Woodworth*, this court recognized the power of the jury in certain actions of tort to assess against the tortfeasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act: the word implies that the wrong complained of was conceived in the spirit of mischief or criminal indifference to civil obligations.”

As nothing of this kind, under the evidence, could be imputed to the defendants the judgment was reversed.

Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther unless it was done wilfully or was the result of that reckless indifference to the rights of others, which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.¹

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For this reason the judgment is reversed and a new trial ordered.

¹ (*Cady v. Case*, 26 Pac. 48. Ks. 1891.) In Washington vindictive damages not allowed. (*Spokane Truck Co. v. Hoefer*, 25 Pac. 1072.) Same rule in Massachusetts, but damages for injured feelings allowed, hence manifestation of malevolence may enhance damages. (*Burt v. Advertiser N. Co.*, 28 N. E. 1. Mass. 1891.) In *Ry. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. R. 261, 47 A. L. J. 186, it was held the Co. was not liable to punitive damages for the wanton act of conductor. *Ry. v. Willooby*, 134 Ind. 563; *Purcell v. Ry.*, 108 N. C. 414, *contra*.

WOODEN WARE CO. v. UNITED STATES.

(106 U. S. 432. — 1882.)

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. Samuel D. Hastings, Jr., for the plaintiff in error.

Mr. Assistant Attorney General Maury for the United States.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error founded on a certificate of division of opinion between the judges of the Circuit Court.

The facts, as certified, out of which this difference of opinion arose, appear in an action in the nature of trover brought by the United States for the value of two hundred and forty-two cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians in the State of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians and carried by them some distance to the town of Depere, and there sold to the E. E. Bolles Wooden Ware Company, the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase.

The timber on the ground, after it was felled, was worth twenty-five cents per cord, or \$60.71 for the whole, and at the town of Depere, where defendant bought and received it, \$3.50 per cord, or \$850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations.

It was the opinion of the Circuit Judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum.

We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. (*Martin v. Porter*, 5 Mee. & W. 351; *Morgan v. Powell*, 3 Ad. & E. (N. S.) 278; *Wood v. Morewood*, 3 id. 440; *Hilton v. Woods*, Law Rep. 4 Eq. 432; *Jegon v. Vivian*, Law Rep. 6 Ch. App. 742.)

The doctrine of the English courts upon this subject is probably as well stated by Lord Hatherley in the House of Lords, in the case of *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have justly been made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertance has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie*."

There seems to us to be no doubt that in the case of a wilful trespass, the rule as stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied even in this class of cases. Such are some that are cited from Wisconsin.

(*Weymouth v. Chicago & Northwestern Railway Co.*, 17 Wis. 550; *Single v. Schneider*, 24 id. 299.)

On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertance or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

Winchester v. Craig, 33 Mich. 205, contains a full examination of the authorities on the point. (*Heard v. James*, 49 Miss. 236; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505; *Baldwin v. Porter*, 12 Conn. 484.)

While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class, where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no wilful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the wilful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to me that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the

property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same right might be applied as in case of the inadvertent trespasser.

But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth \$850, and he wants to satisfy the claim of the government by the payment of \$60. He founds his right to do this, not on the ground that anything *he* has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law as stated in the Institutes of Justinian, Lib. II. Tit. I. sec. 34.

After speaking of the painting by one man on the tablet of another, and holding it to be absurd that the work of an Apelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, *or any other*, shall have taken away the tablet feloniously, it is evident that the owner may prosecute by action of theft."

The case of *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491, is directly in point here. The Supreme Court of Minnesota

says: "The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrong-doer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value; that is, that he is not entitled to recover the full value at the time and place of conversion." That was a case, like this, where the defendant was the innocent purchaser of the logs from the wilful wrong-doer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the government. It has long been a matter of complaint that the depredations on these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the government has no adequate defence against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.

To hold that when the government finds its own property in hands but one remove from these wilful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the Circuit Judge in this case, and the judgment of the Circuit Court is

*Affirmed.*¹

¹ The recovery of interest upon damages in tort actions is discussed in *Wilson v. Troy*, 135 N. Y. 105, 18 L. R. A. 449.

*JOINT WRONG-DOERS.*LOVEJOY *v.* MURRAY.

(3 Wall. 1. — 1865.)

Mr. Hutchins for plaintiffs in error.*Mr. Ball* contra.

MR. JUSTICE MILLER delivered the opinion of the court:

The record before us raises three questions, all of which depend upon the principles of the common law exclusively for their solution.

We will consider them in the order in which they naturally arose on the trial, and in which also they have been argued.

1. Did the defendants, in giving a bond of indemnity to the sheriff, thereby become liable as joint trespassers with him in the proceedings under the attachment?

* * * * *

The first question must, therefore, be answered in the affirmative.

2. Did the plaintiff, by suing Hayden, the sheriff, alone, recovering judgment for about \$6000, and receiving from him \$830 on the said judgment, thereby preclude himself from maintaining this suit against these defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case a bar to this action?

Parke, Baron, in the case of *King v. Hoare*, 13 M. & W. 502, speaking in reference to the same proposition in its application to actions on joint contracts, says, in 1846, that it is remarkable that the question should never have been decided in England. It is equally remarkable that the proposition here presented should be an open question at this day.

The faithful and exhausting research of counsel, in this case, shows that there are conflicting authorities, not only on the main proposition, but on several incidental and collateral points closely connected with it. Two propositions, however, seem to be conceded by all the authorities, which bear with more

or less force upon the main question, and which may as well be stated here.

1. That persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may all be sued in one action ; or one may be sued alone, and cannot plead the nonjoinder of the others, in abatement ; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.

In the latest English case upon the principal question, namely, *Buckland v. Johnson*, 15 C. B. 145, Jervis, Ch. J., holds the former judgment against the son, although fruitless, to be a bar to the second suit against the father for the same goods, upon the ground that by the former judgment the property in the goods was vested in the defendant in the action. As this is the latest cause in the English courts which expressly decides the point, it may, perhaps, be received as the English doctrine. But this concession must be made with some hesitation in view of opinions expressed in other cases decided in the same country. In the very case in which that judgment is rendered, the chief justice takes occasion to correct what he supposes to be an erroneous statement of Tindal, Ch. J., in *Cooper v. Shepherd*, to the effect, "that according to the doctrine of the cases which were cited in argument by a former recovery in trover *and payment of damages*, the plaintiff's right of property vests in the defendant in that action."

It was, therefore, the opinion of Ch. J. Tindall, that *payment of the damages recovered* is essential to vest the property in defendant, and this only a few years before the case of *Johnson v. Buckland* was decided. That case was decided in 1854, and mainly on the authority of *Brown v. Wootton*, reported in

Yelverton, as also by Croke, J. The reason for the decision, as given by Popham, Ch. J., is thus stated in the latter book: "In the cause of action being against divers for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before, is reduced *in rem judicatum*, and to certainty, which takes away the action against others." If the only object, or indeed the principal object, in obtaining a judgment in trespass, was to render certain the extent of plaintiff's injuries, or the amount of damages which would compensate for those injuries, we might be able to comprehend the force of this logic. But as it is the purpose of the law, and the main purpose for which courts of justice are instituted, to procure satisfaction for those injuries, we do not see the sequence in the reasoning of the learned judge.

Brown v. Wootton was decided in Trinity Term, 3 James I. Prior to that time, the law had been thought to be the other way. In *Claxton v. Swift*, 2 Show. 494, Shower said "it was never pretended, until the case of *Brown v. Wootton*, that a bare judgment should be a bar."

In *Cocke v. Jenner*, reported by Hobart, and which was in Trinity Term, 12 James I (only nine years after *Brown v. Wootton*), the question arose on the release of one joint trespasser, which was held to be a bar to a suit against the other, on the ground that it was equivalent to satisfaction; yet the language of the report leaves a strong impression that it was the opinion of the court that several judgments might be had, and that only satisfaction, or its equivalent, would bar proceedings against all who were liable. And the case of *Corbett v. Barnes*, cited from Sir W. Jones (time of Charles the First), which was an *audita querela*, while it holds that only one satisfaction can be had, implies clearly that several judgments may be rendered against joint trespassers. Indeed, that very case was where one judgment had been rendered in the King's Bench against one, and in the Common Pleas against three others, for the same trespass.

These cases show that, after as well as before the case of *Brown v. Wootton*, the law was supposed, by some of the ablest judges in England, to be otherwise than what it

decides; and we know of no case in which it was followed in England as implicit authority, until *Buckland v. Johnson*, in 1854.

The rule in that case has been defended on two grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of *transit in rem judicatum*, become merged into a judgment which is of a higher nature. This principle, however, can only be applicable to parties to the judgment; for as to the other parties who may be liable, it is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefited or advanced towards procuring satisfaction for his damages, by such judgment.

This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord Ellenborough, in *Drake v. Mitchell*, 3 East, 258, "A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have."

The second ground on which the rule is defended is, that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it.

This principle can have no application to trespassers against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of possession. Nor is the principle admitted in regard to conversions of personal property. Prior to *Brown v. Wootton*, the English doctrine seems to have been the other way, as shown by Kent (2 Kent, 388), in his Commentaries, referring to Shepherd's Touchstone, Title "Gift" and Jenkins, p. 109, case 88.

We have thus far confined ourselves to the examination of

the English authorities, and the principles discussed in them, and we are forced to the conclusion that even at this day the doctrine there is neither well settled nor placed on any satisfactory ground.

In turning our attention to the American cases, we have been able to find but two in which the point directly in issue has been ruled in favor of the bar of the former judgment; although there are some other cases which hold that the right of property is transferred by the judgment. The first of these two cases is *Wilkes v. Jackson*, 2 Hen. & M. 355. This was an early case in the Court of Appeals in Virginia, which seems to have passed without much consideration, and was mainly rested on the judgment of the same court in a former case, which does not appear to sustain it.

The other is the Rhode Island case of *Hunt v. Bates*, 7 R. I. 217. It is a very recent case, decided in 1862; but the absence of any other reasoning than a mere recapitulation of the English cases, and the remark that upon their authority the court is obliged to rest its decision, deprives it of any other weight than what should be attached to those cases. This we have already considered.

In addition to this, it has been decided in South Carolina and Pennsylvania, that the recovery of a judgment for the value of the goods converted, transfers the title to the defendant. (*Rogers v. Moore*, 1 Rice, 60; *Floyd v. Brown*, 1 Rawle, 121.)

On the other hand in the case of *Livingston v. Bishop*, 1 John, 290, in the Supreme Court of New York, in 1806, Kent, Ch. J., overrules *Brown v. Wootton*, and holds that judgment alone is not a bar.

In *Sheldon v. Kibbe*, 3 Conn. 214, decided in 1819, in the Supreme Court of Connecticut, the court, by Hosmer, Ch. J., enters into an elaborate examination of the authorities, and a full consideration of the question on principle, and lays down the doctrine that neither a judgment, nor the taking of the body of the defendant in execution, will bar a second action against a co-trespasser. Nothing short of satisfaction or release can have that effect.

In *Sanderson v. Caldwell*, 2 Aiken, 195, in the Supreme Court of Vermont, in 1826, it is held that neither judgment,

nor issuing execution, nor anything short of satisfaction is a bar to a second suit brought against another joint trespasser.

Osterhout v. Roberts, 8 Cow. 43, a year later, in the Supreme Court of New York, was a plea that defendant's son had been sued, had a judgment rendered against him, and had been taken in execution and imprisoned sixty days for the same trespass. Yet the plea was held bad. The trespass was for taking a watch.

In *Elliott v. Porter*, 5 Dana, 299, Robertson, Ch. J., of the Court of Appeals of Kentucky, examines the whole subject fully, both on principle and authority, and holds that the first judgment is no bar, and that the title to the property does not pass by judgment in trespass or trover. This case is affirmed by the same court, in *Sharp v. Gray*, 5 B. M. 4.

Blann v. Cochern, in Alabama, 20 Ala. 320, was an action of trespass. The defendant pleaded a former recovery against a co-trespasser, and payment of the judgment and costs so recovered, to the clerk of the court. But the plea was held bad, because it was not averred that it was accepted by the plaintiff.

In *Knott v. Cunningham*, 2 Sneed, 204, the Supreme Court of Tennessee held that a former judgment against one tortfeasor, was no bar to a suit against another, for the same tort, without satisfaction.

In *Page v. Freeman*, 19 Mo. 421, the Supreme Court of Missouri held the same doctrine.

In *Floyd v. Browne*, 1 Rawle, 125, Gibson, Ch. J., of Pennsylvania, while holding that after a judgment in trover against two trespassers without satisfaction, plaintiff cannot bring assumpsit against another trespasser, uses this language: "A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are concurrent remedies. Trespass is, in its nature, joint and several, and in separate actions against joint trespassers being consistent with each other, nothing but satisfaction by one will discharge the rest." Trover and assumpsit, however, he holds to be inconsistent remedies.

If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment, without satisfaction, is no bar, to look at a question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial and unsatisfactory reasoning.

We have already stated the only two principles upon which it rests. We apprehend, that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatum*. For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter.

In reference to the doctrine that judgment alone vests the title of the property converted, in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally incapable of being maintained on principle.

The property which was mine, has been taken from me by fraud or violence. In order to procure redress, I must sue the wrong-doer in a court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining a judgment — a decision that I am entitled to the relief I ask — the property, which before was mine, has become that of the man who did me the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrong-doer. It is sufficient to state the proposition to show its injustice.

It is said that the judgment represents the price of the property, and as plaintiff has the judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts.

But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the

law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment.

The second question must, therefore, be answered in the negative.

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Affirmed, with costs.

CONTRIBUTION AMONG WRONG-DOERS.

ARMSTRONG COUNTY v. CLARION COUNTY.

(66 Pa. St. 218. — 1870.)

F. Mechling, G. W. Lathey and D. Barclay for plaintiff in error.

W. L. Corbett for defendant in error.

READ, J. The bridge across Red Bank Creek, between the counties of Armstrong and Clarion, at the place known as the Rockport Mills, was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. Whilst John A. Humphreys was crossing the bridge it fell and he was severely injured; he brought suit for damages against the

county of Armstrong; and on the trial, under the charge of the court, there was a verdict for the defendant. This was reversed on writ of error (6 P. F. Smith, 204); and upon a second trial there was a verdict for the plaintiff for \$1100 damages, on which judgment was entered. This judgment, with interest and costs, was paid by Armstrong county, and the present suit is to recover contribution from Clarion county. On the trial the learned judge nonsuited the plaintiff on the ground that one of two joint wrong-doers cannot have contribution from the other.

The commissioners of the two counties had examined the bridge in the summer and ordered some repairs, which were made. There can be little doubt that morally Clarion county was bound to pay one-half of the sum recovered from and paid by Armstrong county, and the question is, does not the law make the moral obligation a legal one? *Merriweather v. Nixon*, 8 Term R. 186, the leading case on the subject, was of a joint injury to real estate, and for the joint conversion of personal property, being machinery in a mill. In *Colburn v. Patmore*, 1 Cr. M. & R. 73, the proprietor of a newspaper, who, for a libel published in it, was subjected to a criminal information, convicted and fined, sought to recover from his editor, who was the author of the libel, the expenses which he had incurred by his misfeasance; Lord Lyndhurst said: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted by the law to recover compensation against a person who has acted jointly with him in the commission of the crime."

So in *Arnold v. Clifford*, 2 Sumner, 238, it was held, a promise to indemnify the publisher of a libel is void. "No one," said Judge Story, "ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice."

In *Miller v. Fenton*, 11 Paige, 18, the wrong-doers were two of the officers of a bank, who had fraudulently abstracted its funds, and of course there could be no contribution between criminals. In the case of *The Attorney General v. Wilson*, 4 Jurist, 1174, cited in the above case by the chancellor, and also reported in 1 Craig & Phillips, 1, where it was contended

that all the persons charged with the breach of trust should be made parties, Lord Cottenham said: "In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties who may more or less have joined in the act complained of." *Seddon v. Connell*, 10 Simons, 81, is to the same effect.

In Story on Partnership, sec. 220, after speaking of the general rule that there is no contribution between wrongdoers, the author says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction, or inference of law. In the latter case, although not in the former, there may be and properly is, a contribution allowed by law for such payments and expenses between constructive wrongdoers, whether partners or not." The case of *Adamson v. Jarvis*, cited by the learned commentator, is in 4 Bing. 66, in which Lord Chief Justice Best, after noticing *Merriweather v. Nixon*, says: "The case of *Phillips v. Biggs*, Hardress, 164" (which was on the equity side of the Exchequer), "was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors."

"From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merriweather v. Nixon*, and from reason, justice and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act."

In *Betts v. Gibbins*, 2 Ad. & E. 57, Lord Denman said: "The case of *Merriweather v. Nixon*, 8 T. R. 186, seems to me to have been strained beyond what the decision will bear—the present case is an exception to the general rule. The gen-

eral rule is, that between wrong-doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself, and *Merriweather v. Nixon*, 8 T. R. 186, was only a refusal of a rule *nisi*." "In *Adamson v. Jarvis*, 4 Bing. 66, we have the observations of a learned person familiar with commercial law."

A promise to indemnify against an act not known to the promisee at the time to be unlawful is valid. (*Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154.)

In *Pearson v. Skelton*, 1 Mee. & Wels. 504, where one stage-coach proprietor had been sued for the negligence of a driver, and damages had been recovered against him, which he had paid, and he sought contribution from another of the proprietors, it was held that the rule there is no contribution between joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act. The same doctrine was maintained in *Wooley v. Batte*, 2 C. & P. 417.

These cases have been followed in this court in *Horbach's Administrators v. Elder*, 6 Harris, 33. "Here" said Judge Coulter, "the plaintiff and defendant are *in equali jure*. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share."

"Contribution," said Lord Chief Baron Eyre, in *Dering v. Earl of Winchelsea*, 1 Cox, 318, "is bottomed and fixed on general principles of natural justice, and does not spring from contract."

These principles rule the case before us. The parties, plaintiff and defendant, are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damage is entitled to contribution from the other.

Judgment reversed, and venire de novo awarded.

TORT NOT MERGED IN FELONY.

B. & W. RY. CORP. v. DANA.

(1 Gray, 83. — 1854.)

S. Bartlett and *A. B. Ely* for the defendant.*C. G. Loring* and *G. Bemis* for the plaintiffs.

BIGELOW, J. The main objection, raised by the defendant in the present case, which, if well maintained, is fatal to the plaintiff's action, presents an interesting and important question, hitherto undetermined by any authoritative judgment in the courts of this Commonwealth.

The plaintiffs seek to recover in an action of assumpsit a large sum of money alleged by them to have been fraudulently abstracted from their ticket office by the defendant, while he was in their employment as depot-master, having charge of their principal railway station in Boston. In regard to this item of the plaintiff's claim, the defendant contended at the trial, and requested the judge who presided to instruct the jury, that the plaintiffs were not entitled to recover in this action the money thus taken by the defendant, because their cause of action, if any they had, was suspended until an indictment had been found or complaint made against the defendant for larceny.

This request was refused, and the jury were instructed, that if the defendant had fraudulently taken and appropriated the plaintiff's money in the manner alleged, and was thereby guilty of larceny, he would be liable in the present action, although no criminal prosecution had first been instituted therefor. It is upon the correctness of this instruction that the first and main question in the case arises.

The doctrine that all civil remedies in favor of a party injured by a felony are, as it is said in the early authorities, merged in the higher offence against society and public justice, or, according to more recent cases, suspended until after the termination of a criminal prosecution against the offender, is

the well-settled rule of law in England at this day, and seems to have had its origin there at a period long anterior to the settlement of this country by our English ancestors. (*Markham v. Cob*, Latch, 144, and *Noy*, 82; *Dawkes v. Coveleigh*, Style, 346; *Cooper v. Witham*, 1 Sid. 375, and 1 Lev. 247; *Crosby v. Leng*, 12 East, 413; *White v. Spettigue*, 13 M. & W. 603; 1 Chit. Crim. Law, 5.)

But although thus recognized and established as a rule of law in the parent country, it does not appear to have been, in the language of our constitution, "adopted, used and approved in the province, colony or State of Massachusetts Bay, and usually practised on in the courts of law." The only recorded trace of its recognition in this Commonwealth is found in a note to the case of *Higgins v. Butcher*, Yelv. (Amer. ed.) 90 a, note 2, by which it appears to have been adopted in a case at *nisi prius* by the late Chief Justice Sewall. The opinion of that learned judge, thus expressed, would certainly be entitled to very great weight, if it were not for the opinion of this court in *Boardman v. Gore*, 15 Mass. 338, in which it is strongly intimated, though not distinctly decided, that the rule had never been recognized in this State, and had no solid foundation, under our laws, in wisdom or sound policy. Under these circumstances, we feel at liberty to regard its adoption or rejection as an open question, to be determined, not so much by authority, as by a consideration of the origin of the rule, the reasons on which it is founded and its adaptation to our system of jurisprudence.

The source, whence the doctrine took its rise in England, is well known. By the ancient common law, felony was punished by the death of the criminal and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offence. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property,

except after a conviction of the offender, by a proceeding called an appeal of felony, which was long disused, and wholly abolished by St. 59, Geo. 3, c. 46; or under St. 21, H. 8, c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured or of others by his procurement. (2 Car. & P. 43, n.) But these incidents of felony, if they ever existed in this State, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods, on conviction of crime, was rarely, if ever, exacted here; and in many cases, deemed in England to be felonies and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies, to which a party injured was entitled in cases of felony, were never introduced into our jurisprudence. No one has ever heard of an appeal of felony, or a writ of restitution under St. 21, H. 8, c. 11, in our courts. So far, therefore, as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law.

Without regard, however, to the causes which originated the doctrine, it has been urged with great force and by high authority, that the rule now rests on public policy (12 East, 413, 414); that the interests of society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be permitted to redress their private wrongs, until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty, by bringing his private interest in aid of its performance, which would be wholly lost, if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless entitled to great weight in England, where the mode of prosecuting criminal offences is very different from that adopted with us. It is there the especial duty of every one, against whose person or property a crime has been committed, to trace out the offender, and prosecute him to conviction. In the discharge of this duty, he is often compelled to employ counsel; procure an indictment to be drawn and laid before the grand jury, with the evidence

in its support; and if a bill is found, to see that the case on the part of the prosecution is properly conducted before the jury of trials. All this is to be done by the prosecutor at his own cost, unless the court, after the trial, shall deem reimbursement reasonable. (1 Chit. Crim. Law, 9, 825.) The whole system of the administration of criminal justice in England is thus made to depend very much upon the vigilance and efforts of private individuals. There is no public officer, appointed by law in each county, as in this Commonwealth, to act in behalf of the government in such cases, and take charge of the prosecution, trial and conviction of offenders against the laws. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and co-operation of those injured by the commission of crimes, which are not requisite with us. It is to this cause that the rule in question, as well as many other legal enactments, designed to enforce upon individuals the duty of prosecuting offences, owes its existence in England. But it is hardly possible, under our laws, that any grave offence of the class designated as felonies can escape detection and punishment. The officers of the law, whose province it is to prosecute criminals, require no assistance from persons injured, other than that which a sense of duty, unaided by private interest, would naturally prompt.

On the other hand, in the absence of any reasons, founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain in a court of law a defence founded solely upon his own criminal act. The right of every citizen, under our constitution, to obtain justice promptly and without delay, requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such necessity calling for the adoption of the rule

under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence.

We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the States, where the rule had been established by decisions of the courts, it has been abrogated by legislative enactments. (*Pettingill v. Rideout*, 6 N. H. 454; *Cross v. Guthery*, 2 Root, 90; *Piscataqua Bank v. Turnley*, 1 Miles, 312; *Foster v. Commonwealth*, 8 W. & S. 77; *Patton v. Freeman*, Coxe, 113; *Hepburn's Case*, 3 Bland, 114; *Allison v. Farmer's Bank of Virginia*, 6 Rand. 223; *White v. Fort*, 3 Hawks, 251; *Robinson v. Culp*, 1 Const. Rep. 231; *Story v. Hammond*, 4 Ohio, 376; *Ballew v. Alexander*, 6 Humph. 433; *Blassingame v. Graves*, 6 B. Monr. 38. Rev. Sts. of N. Y. Part 3, c. 4, § 2; St. of Maine of 1844, c. 102.)

* * * *

LOCALITY OF WRONG.

LE FOREST v. TOLMAN.

(117 Mass. 109. — 1875.)

TORT, under the Gen. Sts. c. 88, § 59, to recover double the amount of damage sustained from the bite of a dog.

At the trial in the Superior Court, before Aldrich, J., it appeared that the plaintiff was bitten and injured by the defendant's dog at Pelham, in the State of New Hampshire, where the plaintiff lived with his father and mother; that the defendant was a resident of Dracut, in this Commonwealth, and had a place of business in Lowell, and kept his dog at Dracut and at his place of business in Lowell; that the day the injuries complained of were done the defendant's dog strayed away from his owner into New Hampshire, and was seen several times in the neighborhood of the plaintiff's residence; that the next day the plaintiff's father received the dog and carried him to the defendant at his place of business in Lowell. Upon this state of facts, the defendant asked the judge to rule that the action could not be maintained, which the judge declined to do. The jury returned

a verdict for the plaintiff, and the defendant alleged exceptions.

C. A. F. Swan for the defendant.

G. Stevens and *W. H. Anderson* for the plaintiff.

GRAY, Ch. J. In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. (*Smith v. Condry*, 1 How. 28; *S. C.* 17 Pet. 20; *The China*, 7 Wall. 53, 64; *Blad's Case*, 3 Swanst. 603; *Blad v. Bamfield*, ib. 604; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1; *The Halley*, L. R. 2 Adm. 3, and L. R. 2 P. C. 193; *Wood v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Mahler v. Norwich & New York Transportation Co.*, 35 N. Y. 352; *Needham v. Grand Trunk Railway*, 38 Vt. 294; *Richardson v. New York Central Railroad*, 98 Mass. 85.)

In the case at bar, the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accustomed to attack and bite mankind. (*Popplewell v. Pierce*, 10 Cush. 509; *Pressey v. Wirth*, 3 Allen, 191.) No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that State.

The plaintiff relies upon the statute of this Commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." (Gen. Sts. c. 88, § 59.) This statute is not a penal, but a remedial statute, giving all the damages to the person injured. (*Mitchell v. Clapp*, 12 Cush. 278.) It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures

another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

The defendant having done no wrongful act in this Commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that State, this action cannot be maintained.

*Exception sustained.*¹

¹ Injury to land in one State, caused by an act done in another, such as the diversion of a stream, is actionable in either State. (*Thayer v. Brooks*, 17 Ohio St. 489; *Rundle v. Del. Can. Co.*, 1 Wall. Jr. 275, 288-9.) Trespass to land is local, but the slander of title is transitory. (*Dodge v. Colby*, 108 N. Y. 445; 15 N. E. 703.)

BOOK II.

CHAPTER VI.

ASSAULT AND BATTERY.

CLARK *v.* DOWNING.

(55 Vt. 259. — 1882.)

A. M. Dickey and *G. A. Dickey* for plaintiff.

R. M. Harvey and *J. R. Darling* for defendant.

ROYCE, Ch. J. (Minor points omitted.) The only other exception was to the refusal of the court to charge as requested. The evidence referred to in the exceptions, and upon which the request was predicated, and the question of what in law constitutes an assault, have to be considered in deciding whether the request should have been complied with or not. It appears that the evidence as to what transpired at the time and upon the occasion when it was claimed that the assault was committed was conflicting, and the request was based upon the supposition that the jury might find the fact as the plaintiff's evidence tended to show.

Admitting that the jury might so find, did the striking of the plaintiff's horse constitute an assault upon the plaintiff? It is not necessary to constitute an assault that any actual violence be done to the person. If the party threatening the assault have the ability, means and apparent intention to carry his threat into execution, it may in law constitute an assault. The disposition, accompanied with a present ability to use vio-

lence, has been held to amount to an assault. Where violence is used it is not indispensably necessary that it should be to the person. It was decided in *Hopper v. Reeve*, 7 Taunt. 698, that the upsetting of a chair or carriage in which a person was sitting was an assault; in *Morton v. Shoppe*, 3 C. & P. 373, that riding after a person at a quick pace and compelling him to run into his garden to avoid being beaten was an assault; that the striking of the horse upon which the wife of the plaintiff was riding was an assault upon the wife. (1 Stephen N. P. 210.)

An assault is defined in *Hays v. People*, 1 Hill, 351, to be an attempt with force or violence to do a corporal injury to another. The striking of the plaintiff's horse in the manner that his evidence tended to show would probably result in a corporal injury to him; hence the request should have been complied with.

The case should have been submitted to the jury for them to find whether the striking was as the plaintiff claimed it to have been, or in the manner and for the reasons indicated in the defendant's plea.

Judgment reversed, and cause remanded.

KEEP v. QUALLMAN.

(68 Wis. 451. — 1887.)

THE parties are neighbors, but not friends. On a certain Sunday afternoon they met in a public highway. Several other persons were present. The testimony tends to show that the defendant accosted the plaintiff by asking him, "What is the reason you are slandering me around all the time?" that immediately the plaintiff put his hand in his pocket, and was about taking it out again when the defendant struck him on the head with a cane twice, knocking him down. He got up, and, as the defendant testifies, attacked the latter, whereupon they fought with their fists until plaintiff was vanquished and retreated. The defendant also testifies that he had just then

heard that the plaintiff had told their neighbors to watch him; that previously he had been told that, at different times, the plaintiff had threatened to inflict personal violence upon him, and that plaintiff was in the habit of shooting people, and was a dangerous man; and when he put his hand in his pocket, the movement indicated to his (the defendant's) mind an intention to draw a revolver.

The court excluded other testimony offered by the defendant to show that the plaintiff was of a quarrelsome disposition and in the habit of using dangerous weapons. The jury were instructed that the defendant had shown no legal justification for the assault, and hence the defendant was liable to respond in damages therefor, and the case was submitted to the jury only for an assessment of damages. The damages were assessed at \$175. A motion for a new trial was denied, and judgment was entered for the plaintiff pursuant to the verdict.

The defendant appeals from the judgment.

C. S. Fuller for appellant.

Webster & Miller for respondent.

LYON, J. It was not unlawful for the defendant to address the plaintiff as he did when they met on the highway, and if the plaintiff by his former threats of personal violence (if he made any), and by putting his hand in his pocket as testified to by the defendant (if he did so), gave the defendant reason to believe that he was about to draw a revolver or other weapon upon him, it was an assault, and the defendant had the right to act upon appearances and at once repel or prevent the supposed contemplated attack. (See 1 Whart. Crim. Law, §§ 603, 606.) We think the testimony sufficient to send to the jury the question whether the acts of the plaintiff were sufficient to give the defendant reason to believe that he was in imminent danger of being attacked by the plaintiff when he knocked the latter down. That is to say, we think the testimony tends to prove a state of facts from which the jury might properly find the defendant was legally justified in striking the blows to prevent the plaintiff from attacking him.

Hence the instruction that the defendant was absolutely liable in the action was erroneous. The instruction should have been that if the defendant had no reasonable grounds to fear an immediate attack by the plaintiff, or, having such grounds, if he used more force than was necessary to prevent such attack, the plaintiff could recover; otherwise not.

We are also inclined to think that on the authority of *State v. Nett*, 50 Wis. 524, proof of the quarrelsome and violent disposition of the plaintiff should have been received, as elements in the correct solution of the questions above suggested.

By the Court. The judgment of the Circuit Court is reversed, and the cause will be remanded for a new trial.

BISHOP v. RANNEY.

(59 Vt. 316. — 1887.)

GENERAL *assumpsit*. Plea in offset. Heard on referee's report. Judgment for plaintiff.

Plaintiff contracted to work for defendant until his sawing was done. Before the term of service had expired he left defendant's employment because of his treatment of him. This action was brought to recover a balance of wages due him (plaintiff). Defendant claimed damage because plaintiff did not perform his contract as to time. As to plaintiff's justification for so leaving, the referee found: "On the twenty-fifth of April, defendant and plaintiff were at work together in the mill-yard. Defendant sent his boy up to Mr. Colby's to get him to come down. The boy came back, saying Mr. Colby would be at home by the time he got there. The boy went. Soon the plaintiff and defendant went to supper. While at the table defendant expressed surprise that his boy did not return. Plaintiff said Mr. Colby was at work for Mr. Dowd, and not at home. Defendant said, 'Why didn't you tell me that before I sent him back?' Plaintiff replied, 'I did not know where you sent him.' Defendant replied, 'You did know it.' Plaintiff reiterated that he did not. Defend-

ant rose from the table in a threatening manner, and said violently to plaintiff that he must not tell him he lied in his own house. Defendant's mother told him to sit down. Plaintiff made no reply, but after finishing his supper he told the defendant that he might find another man, as he should work no longer. The defendant is a much larger and more powerful man than the plaintiff. The plaintiff made no reply to defendant when he rose from the table because he feared violence. Plaintiff worked no more."

J. P. Otis for plaintiff.

Cahoon & Hoffman for defendant.

VEAZEY, J. The case involves the question whether the report shows that the plaintiff was justified in leaving the defendant's employment before the expiration of the term of service contracted for. The plaintiff claims that the conduct of the defendant constituted an assault, and therefore justified his leaving, although there was no battery.

In 2 Greenl. Ev. sec. 82, an assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect, and the author cites 1 Steph. N. P. 208; Finch's Law, 202. He further says: "Mere threats alone do not constitute the offence; there must be proof of violence actually offered;" citing *Stephens v. Myers*, 4 Car. & P. 349; *Tuberville v. Savage*, 1 Mod. 3. And he further says: "The intention to do harm is of the essence of an assault." (*Jones v. Wylie*, 1 Car. & K. 257.) In Add. Torts, the author says: "Every attempt, also, to offer with force and violence to do hurt to another constitutes an assault." And upon the authority of *Read v. Coker*, 13 C. B. 860, he further says: "And any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect, is an assault," unless immediate contact is impossible. (*Cobbett v. Grey*, 4 Exch. 729, 744.) In *Clark v. Downing*, 55 Vt. 259, 262, Royce, Ch. J. says: "If the party threatening the assault have the ability, means and apparent intention to carry his threat into execution, it may

in law constitute an assault." Bishop says: "An assault is an unlawful physical force, partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury to a human being." (2 Bish. Crim. Law, sec. 32.)

We think, in the light of these definitions and decisions, the plaintiff is correct in his claim that there was an assault. Following the angry controversy of words was a threatening movement, in close proximity, accompanied by violent language in the nature of a threat, and by a much larger and more powerful man than the plaintiff; and the demonstration caused the plaintiff to fear violence.

* * * * *

We think the report warranted the judgment of the county court, and it is affirmed.¹

EXCUSABLE ACTS.

HARVEY v. DUNLOP.

(Hill & Den. 193. — 1843.)

TRESPASS tried at the Washington circuit in June, 1839, before Willard, Ch. J. The plaintiff declares against the defendant for throwing a stone at his daughter, and putting out her eye, *per quod*, etc. Plea, the general issue, with notice of special matter. The case was this: The plaintiff's daughter (Clementine), who was about five, and the defendant, about six years of age, were associates and in the habit of playing together. In the fall of 1835 they went out to gather beechnuts, and, after being absent a few hours, returned to the plaintiff's house, both of them crying. On being asked what the matter

¹ Intent to execute the threat is not essential to an assault. (*Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373.) *Mercer v. Corbin*, 117 Ind. (1889); 20 N. E. 132, driving a bicycle against another when walk was 14 feet wide and no obstruction. A few courts hold it necessary to a criminal assault. (*Chapman v. State*, 78 Ala. 463; 56 Am. R. 42.)

Deception may be equivalent to force. (*Come v. Stratton*, 114 Mass. 303; 19 Am. R. 350; *McCue v. Klein*, 60 Tex. 168; 48 Am. R. 260.)

was, the defendant stated that he had thrown a stone and killed Clementine or put out her eye. Neither of them said whether the stone was thrown by accident or design, nor did it appear from any one having personal knowledge how this was on the trial, as the plaintiff's daughter was not sworn as a witness. The eye had become incurably blind. The plaintiff had repeatedly admitted that the defendant was not to blame, though it was not shown that he could have had any knowledge on the subject save such as he obtained from the children themselves, and that the injury was accidental.

M. Fairchild and J. Carey for the plaintiff.

C. L. Allen for the defendant.

By the court. NELSON, Ch. J. I am of opinion that the grounds upon which the learned judge placed the case before the jury were correct. No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part; and this was substantially the doctrine of the charge. All the cases concede that an injury arising from inevitable accident, or which in law and reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility. Thus it is laid down that, "If one man has received a corporal injury from the voluntary act of another, an action of trespass lies, provided there was a neglect or want of due caution in the person who did the injury, although there was no design to injure." (Bac. Abr. tit. Trespass, D.) But if not imputable to the neglect of the party by whom it was done, or to his want of caution, an action of trespass does not lie, although the consequences of a voluntary act. (*Weaver v. Ward*, Hob. 134; *Gibbons v. Pepper*, 4 Mod. 405.) It was said by Dallas, Ch. J., in *Wakeman v. Robinson*, 1 Bingham 213, "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie;" and the same principle is recognized in *Bullock v. Babcock*, 3 Wend. 391.

But it is said that inasmuch as the defendant admitted the injury to have been inflicted by him, it should be presumed to have been done wrongfully or carelessly, and that the *onus* lay upon him to show the contrary. This is undoubtedly a sound general principle, and the plaintiff is entitled to the full benefit of it; but it was for the jury to determine, upon the facts and circumstances before them, whether or not the defendant was in the wrong. In order to arrive at a decision upon this question the jury had a right to take into consideration the childhood of the parties, the friendly relations existing between them, the conduct of both on their return home, but more especially the repeated admissions of the plaintiff that the defendant was not to blame. The latter fact was very material, and must and should have produced a strong impression upon the minds of the jury in the absence of the testimony of Clementine, because the natural inference to be drawn from the declarations was that the plaintiff had received the information upon which they were based from his daughter's account of the transaction, and had frankly disclosed it though the admissions operated against his own interest. These admissions, taken in connection with the other facts and circumstances in the case, were undoubtedly decisive of the true character of the transaction, and they conduct us satisfactorily to the same conclusion arrived at by the jury, that the misfortune happened without fault on either side, and that it was one of those unhappy accidents to which children of the tender age of these parties are not unfrequently exposed in their little innocent plays and amusements — a result rather to be deplored than punished.¹

New trial denied.

¹ Cf. *Peterson v. Haffner*, 59 Ind. 130; 26 Am. R. 81, holding that a boy 13 years old, who in sport but wantonly threw a piece of mortar at A, and hit and hurt his eye, is liable; also cases in note, 26 Am. R. 83.

RICHMOND v. FISK.

(100 Mass. 34. — 1893.)

TORT: first count for assault and battery; second, for trespass upon plaintiff's close. Defendant delivered milk to plaintiff at an early hour every morning, the hall and kitchen doors being left unlocked so that he could enter and leave the milk. Plaintiff had forbidden the defendant entering the former's sleeping room. On the morning in question after a night of suffering from sick headache, the plaintiff had fallen asleep, when the defendant entered the sleeping room, shook the plaintiff so as to awaken him and presented a milk bill. The trial court gave judgment for the defendant, from which plaintiff appealed.

FIELD, C. J. . . . The agreed facts show that the defendant entered plaintiff's close by his permission. The fact that, after the defendant entered by permission through the outer door into the hall, he went, against the commands of the plaintiff, into plaintiff's sleeping room, does not constitute a trespass upon the close. (*Smith v. Pierce*, 110 Mass. 35.) But the facts show a trespass upon the person of the plaintiff. (*Com. v. Clark*, 2 Met. 23.) On the facts agreed, it must be taken that the defendant, against the express commands of the plaintiff, entered the plaintiff's sleeping room and "took hold of his arm and shoulders and used sufficient force to awaken the plaintiff for the purpose of presenting a milk bill." If there were any circumstances which would justify this, they do not appear in the agreed statement of facts. Although this trespass is slight, the damages are not necessarily nominal, and they should be left to be assessed by the Superior Court. The judgment should be reversed, and, in accordance with the agreed statement, the plaintiff's damages should be assessed under the first count.

KIRBY v. FOSTER.

(17 R. L. 437. — 1891.)

STINESS, J. The plaintiff was in the employ of the Providence Warehouse Co., of which the defendant, Samuel J. Foster, was the agent, and his son, the other defendant, an employee. A sum of fifty dollars belonging to the corporation had been lost, for which the plaintiff, a bookkeeper, was held responsible, and the amount was deducted from his pay. On January 20, 1888, Mr. Foster handed the plaintiff some money to pay the help. The plaintiff, acting under the advice of counsel, took from this money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to Mr. Foster, saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants then seized the plaintiff and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, for which this suit is brought. The jury having returned a verdict for the plaintiff, the defendants petition a new trial on exceptions to the rulings and refusals to rule of the presiding justice. It is unnecessary to repeat the several exceptions, since they involve substantially but one question, viz: whether the defendants were justified in the use of force upon the plaintiff to retake the money from him. . . . Unquestionably, if one takes another's property from his possession without right and against his will, the owner or person in charge may protect his possession, or retake his property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault in thus defending his right, by using force to prevent his property from being carried away. But this right of defence and recapture involves two things: first, possession by the owner, and, second, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly though erroneously, claims it as his own, the owner has no right to retake it by personal force. If

he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defence, but not of redress. The circumstances may be aggravating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defence of one's possession and the right of recapture as against a mere wrongdoer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. . . . In the most favorable view of the case for the defendants, the plaintiff having obtained the money by no crime, misrepresentation, or violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in *Bliss v. Johnson*, 73 N. Y. 529: "The general rule is, that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld." See also, *Harris v. Marco*, 16 S. Car. 575; *Barnes v. Martin*, 51 Wisc. 240; *Andre v. Johnson*, 6 Blackf. Ind. 375.

In *Commonwealth v. McCue*, 16 Gray, 226, it was held that an owner of cattle, which had been taken up by one who claimed

to be a field driver, had no right to commit an assault in retaking his property, even though the complainant acted only as an officer *de facto* and demanded illegal fees. But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy. The defendants cite the following cases, which, it will be seen, are plainly distinguishable from the case at bar. *Blades v. Higgs*, 10 C. B. N. S. 713. This was on demurrer to a plea, which set up that the plaintiff had possession, wrongfully and against the will of the owner, of certain property, which the plaintiff was about to carry away. The plea was held to be a good justification for necessary force, upon the assumed ground that the defendants had actual possession of the chattels, which the plaintiff took against their will. In *Johnson v. Perry*, 56 Vt. 703, and *Gyre v. Culver*, 47 Barb. S. C. 592, there was no claim of right on the part of the plaintiff to the property he had taken. In *Hodgden v. Hubbard*, 18 Vt. 504, the plaintiff obtained the property by false representation. *Baldwin v. Hayden*, 6 Conn. 453, apparently sustains the defendants' contention that an owner has a right to retake property intrusted to another, if he is about to carry it away; yet it does not appear in that case that the defendant made any claim of title to the paper in question, only that he supposed he had permission to take it away. *State v. Elliott*, 11 N. H. 540, is in the same line, but extremely guarded in expression. It appears to have been a very slight assault, which the court was quite willing to justify, without consideration of authorities. But the court says the right of recapture of property is far more limited than that of its defence, and recognizes the question whether the person removing it is a mere wrong-doer, as one of the questions to be determined. . . . We think, therefore, with reference to the case as it stood, there was no error in the charge as given, nor in the refusals to charge as requested.

STATE v. SHERMAN.

(16 R. I. 631. — 1889.)

DURFEE, C. J. This is a criminal complaint against John P. Sherman and others for assault and battery on the person of Charles C. Sherman. It comes up here on exceptions from the Court of Common Pleas.

The bill of exceptions shows as follows: The defendant John P. Sherman was occupying as tenant a tract of land bordering on a tidal cove connecting with Point Judith pond; and Charles C. Sherman, the complainant, built a causeway of dirt and stones in the pond across the mouth of the cove, so as to close it, except for the space of about 30 feet at one end, where the water was shallow, thereby obstructing said defendant in the use of the water for ingress and egress to and from his land by boat. On the day of the assault, said defendant, wishing to go out with his sail-boat, went upon the causeway to open a passage through the deeper part, and began work to that end. The complainant came down soon afterwards to stop him, and the affray occurred. After the case had been argued to the jury he (deft.) asked the court to instruct the jury as follows, to-wit: "That a man in a public place, if attacked, may resist with his natural weapons, using no more force than is necessary, without retreating." The court refused, but did instruct them that in such a case a man must retreat, if he can safely, and that the defendant did not testify that there was anything to prevent his retreating. The defendant excepted to both the refusal and the instruction. The bill of exceptions sets forth that the complainant's counsel stated in his argument to the jury that he did not claim for the complainant the right to use any force to protect the causeway, or any force against the defendant, except such as he might lawfully use in any public place.

We think the court below erred. Generally, a person wrongfully assailed cannot justify the killing of his assailant in mere self-defence if he can safely avoid it by retreating. Retreat is not always obligatory, even to avoid killing; for, if attack be

made with deadly weapons, or with murderous or felonious intent, the assailed may stand his ground, and, if need be, kill his assailant. But there is no question of killing here; and we know of no case which holds that retreat is obligatory, simply to avoid a conflict. Where there is no homicide, the rule generally laid down is that the assaulted person may defend himself, opposing force to force, — using so much force as is necessary for his protection, — and can be held to answer only for exceeding such degree. Mr. Bishop, in his work on Criminal Law, § 850, says: “The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of the case, give back blow for blow.” (See, also, 1 Whart. Crim. Law, § 99; Steph. Dig. Crim. Law, art. 200; May, Crim. Law, (Student’s Ser.) § 62.) Mr. May’s language is: “There seems to be no necessity for retreating, or endeavoring to escape from the assailant, before resorting to any means of self-defence short of those which threaten the assailant’s life.” In *Com. v. Drum*, 58 Pa. St. 9, 21, 22, where the defendant, who was indicted for murder, set up that he acted in self-defence, the court, in charging the jury, used the following language: “The right to stand in self-defence without fleeing has been strongly asserted by the defence. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom, our liberties would be worthless. But the law does not apply this right to homicide.” There are cases, however, which manifest a disposition to apply the same rule generally. (*Runyan v. State*, 57 Ind. 80; *Erwin v. State*, 29 Ohio St. 186.) In *Gallagher v. State*, 3 Minn. 270, the defendant was complained of for assault and battery, and set up in justification that he acted in self-defence, the complainant having stepped forward with his cane raised as if about to strike. The lower court, on trial, ruled as follows: “Where a person is approached by another with a cane raised in a hostile manner, the former is not justified in striking unnecessarily, but is bound to retreat reasonably before striking. On error the Supreme Court held the ruling to be erroneous. “Such is

not the law," say the court; "but the party thus assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without retreating at all." The case is exactly in point.

The exception is therefore sustained, and the cause will be remitted for a new trial.

SELF-DEFENCE.

DOLE v. ERSKINE.

(35 N. H. 503. — 1857.)

Cushing for plaintiff.*Burke* for defendant.

EASTMAN, J. The only reported decision that we have been able to find, where the question presented was the same as that raised in the case before us, is that of *Elliott v. Brown*, 2 Wendell, 499. In that case it was held that the party first attacked, in a personal rencounter between two individuals, is not entitled to maintain an action for an assault and battery, if he uses so much personal violence towards the other party, exceeding the bounds of self-defence, as could not be justified under the plea of *son assault demesne*, were he a party defendant in a suit.

If the rule laid down in that case is sound law, this suit cannot be sustained, for the commissioner to whom the action was referred has reported, that, although the defendant committed the first assault, yet the plaintiff used more force than was necessary or justifiable in repelling that assault.

The ground upon which the decision in *Elliott v. Brown* was placed, is, that there cannot be a recovery in cross actions for the same affray, but that the party who first recovers may plead that recovery in a suit against himself. No authority is cited to sustain that position, and it appears to us that it is not well founded.

If an assault is made upon a party, it may be repelled by force sufficient for self-defence, even to the use of violence; and if no more force is used than what is necessary to repel the attack, the party assaulted may, under the plea of *son assault demesne*, show the facts and have judgment. To this extent the law is well settled. (2 Greenl. Ev. sec. 95, and authorities cited.) If the affray stops there, the party first assailed, being justified in what he has done in self-defence,

may have his action for the injury that he has received. He has himself done nothing more than what the law permits; but the other party, in commencing and following up the assault, is liable not only for a breach of the peace, but for all the personal injuries that he has inflicted.

But if the person assaulted uses excessive force, beyond what is necessary for self-defence, he is liable for the excess, and the facts may be shown under the replication of *de injuria*. (*Curtis v. Carson*, 2 N. H. 539; *Hannen v. Edes*, 15 Mass. 349; *Cockcroft v. Smith*, Salk. 642; Bul., *Nisi Prius*, 18.)

Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defence he has committed no breach of the peace, and done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given, wiped out by the excessive castigation which he receives from the other party, then each party may sustain an action; the one that is assailed, for the assault and battery first committed upon him, and the assailant, for the excess of force used upon him beyond what was necessary for self-defence.

We think that these are not matters of setoff; that the one cannot be merged in the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed; the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other

party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defence. When he uses the excessive force, he then for the first time becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after?

In *Elliott v. Brown* it is conceded that both parties may be indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subject of setoff is entirely clear.

We arrive, then, at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one in the other, but that each party may maintain an action for the injury received; the assailed party, for the assault first committed upon him, and the assailant for the excess above what was necessary for self-defence. This rule, it appears to us, will do more justice to the parties and more credit to the law than the other, for by it the party who has commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist.

We think, also, that the view of the case which we have taken derives much strength from the fact that no precedent can be found of any pleading sustaining the defendant's views. It is remarkable that such a plea cannot be found in any of

the books, if the defence has ever been regarded by the courts as good law.

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Our opinion therefore is, that, upon the facts stated, the plaintiff would be entitled to judgment. But according to the provisions of the transfer, the case must be sent to the Common Pleas for further proceedings.¹

FALSE IMPRISONMENT.

SMITH v. STATE.

(7 Humph. 43 — 1846.)

RODGERS, with horse and carryall, was carried over the Chucky river by Smith in his ferry-boat. Smith was the keeper of a public ferry. When over Smith demanded ferriage, which Rodgers said was already paid: on this a dispute occurred, and Smith told him he should not go on till he paid the ferriage. Some other conversation ensued, when Rodgers paid the ferriage demanded. Rodgers was detained ten or fifteen minutes.

An indictment was found against Smith for an assault and false imprisonment.

Rodgers stated on the trial before R. M. Anderson, presiding judge, and a jury of Cocke County, that Smith had not touched his bridle or his horse; that he made no effort to strike or touch his person or his horse, and that he made no threats of personal violence, but that he was afraid of a difficulty with Smith. Smith told Rodgers after he had paid the charge, that if he had not paid it he had determined to have put his carryall and horse back into the boat, and to have carried them back.

¹ A violent attack is sufficient excuse for going beyond mere self-defence and reasonably chastising assailant. (*People v. Pearl*, 76 Mich. 207 (1889); 42 N. W. 1109.) Neither provoking language nor assault on former occasion by plaintiff will justify defendant's assault. (*Gizler v. Witzel*, 82 Ill. 323.)

Assault may be made to defend, but not to obtain possession of one's property. (*Churchill v. Hulbert*, 110 Mass. 42; *Briston v. Burr*, 120 N. Y. 427.)

A verdict and judgment were rendered for the State, and defendant appealed.

Arnold for plaintiff in error.

Attorney General for the State.

GREEN, J., delivered the opinion of the court.

The plaintiff in error was indicted for an assault and false imprisonment of Mark M. Rodgers. The court charged the jury, "That to make out the offence as charged, no actual force was necessary, but that a man might be assaulted by being beset by another; and if the opposition to the prosecutor's going forward was such as a prudent man would not risk, then the defendant would, in contemplation of law, be guilty of false imprisonment."

This charge is correct in all its parts, and the facts were fairly left to the jury. A verdict of guilty has been pronounced, and we do not feel authorized to disturb it. The prosecutor and defendant disputed about the ferriage defendant claimed. Smith insisted upon this demand, and said he did not choose to sue every man that crossed at his ferry. Although he did not take hold of the prosecutor, or offer violence to his person, yet his manner may have operated as a moral force to detain the prosecutor.

And this appears the more probable, as after the affair was settled, the prosecutor inquired what defendant would have done if he had not paid the ferriage demanded, to which the defendant replied, "he would have put his carryall and horse back into the boat and taken them across the river again." As this determination existed in his mind, it doubtless was exhibited in the manner of the defendant, and thus operated upon the fears of the prosecutor.¹

Affirm the judgment.

¹ *McNay v. Stratton*, 9 Bradw. 215; *Hildebrand v. McCrum*, 101 Ind. 61; *Fotheringham v. Adams Ex. Co.*, 36 Fed. R. 252 (shadowed by detectives), accord. Personal coercion necessary to arrest. (*Hill v. Taylor*, 50 Mich. 549; *State v. Lunsford*, 81 N. C. 528; see 61 Am. Dec. 152, and note.)

It is not false imprisonment for a teacher to detain a pupil a short time after school hours. (*Fertich v. Mishener*, 111 Ind. 472; 60 Am. R. 709.)

MARKS v. TOWNSEND.

(97 N. Y. 590. — 1885.)

A. Blumenstiel for plaintiff.*J. L. Ward* for defendant.

EARL, J.

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The plaintiff was also properly nonsuited as to his cause of action for false imprisonment. The act (c. 300 of the Laws of 1831) under which the warrant was issued in November, 1878, was not repealed until May 10, 1880. (Chap. 245, Laws of 1880.) The facts stated in the affidavit upon which the warrant was issued were sufficient to give the judge who issued it jurisdiction; and in issuing it he acted judicially and made a judicial determination. The warrant was not, therefore, void or voidable or irregular. It was the result of the regular judicial action of a judicial officer having jurisdiction upon the facts presented to him to issue it. It was subsequently set aside by the judge who issued it, when a new fact, to wit, that the plaintiff had been before arrested in an action against him by these defendants, upon an order of arrest issued in the action for the same cause, and upon substantially the same grounds, was brought to his attention. The existence of this fact did not make the warrant void or irregular. When brought to his attention it furnished the judge a ground for the dismissal of the warrant in the exercise of further judicial action. It matters not whether the warrant was dismissed in the exercise of judicial discretion or upon the claim by the plaintiff that he could not be twice arrested for the same cause, and hence that he had the absolute legal right to be discharged from the second arrest; it was at most a case where the plaintiff was erroneously arrested. An error was committed, which upon a proper presentation of the facts was to be corrected by further judicial action. A warrant, granted under such circumstances, protects against an action for false imprisonment, not only the judge who granted it,

but the party who procured it and instigated its service. The case stands no different from what it would have been if the plaintiff had appeared and denied the facts alleged in the affidavit upon which the warrant was based, and had thus procured his discharge upon the merits, or if the defendants, when they applied for the warrant, had disclosed the fact of the prior arrest, and the judge had erroneously decided that they were yet entitled to it, and his decision had upon appeal been reversed; or if when the fact of the prior arrest was afterward brought to his attention, he had refused to set aside the warrant, and his decision had upon appeal been reversed. If the warrant of attachment or an order of arrest is issued in an action upon facts giving the judge jurisdiction and the defendant appears, and by showing new facts, or denying those alleged against him, procures the attachment or the order to be set aside, the process is not void or voidable, or irregular, but simply erroneous, and protects the judge and the party who procures it, although it is set aside, against an action for trespass or false imprisonment. In all such cases these are regular judicial methods, and that which was legally done at the time cannot be converted into a wrong by relation after the process has by judicial action been set aside. This rule of exemption is founded in public policy, and is applicable alike to civil and criminal remedies and proceedings, that parties may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances without the risk of undue punishment for their own ignorance of the law or for the errors of courts and judicial officers. The remedy of the party unjustly arrested or imprisoned is by the recovery of costs which may be awarded to him, or the redress which some statute may give him, or by an action for malicious prosecution, in case the prosecution against him has been from unworthy motives and without probable cause.

Even malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggravate his damage, but have nothing whatever to do with the cause of action. Hence if in this case the defendants had intentionally withheld from the judge who granted the warrant the fact of the plaintiff's prior arrest, that fact

would have been quite pertinent to maintain an action for malicious prosecution, but would not have laid the foundation for a recovery in an action for false imprisonment.

We have carefully examined many authorities, and have not found one which decides that in a case like this an action for false imprisonment can be maintained. They all sustain the views above expressed. (*Williams v. Smith*, 14 C. B. (N. S.) 596; *Hayden v. Shed*, 11 Mass. 500; *Reynolds v. Corp*, 3 Caines, 268; *McGuinty v. Herrick*, 5 Wend. 240; *Chapman v. Dyett*, 11 id. 31; *Deyo v. Van Vakenburgh*, 5 Hill, 242; *Landt v. Hiltz*, 19 Barb. 283; *Simpson v. Hornbeck*, 3 Lans. 52; *Miller v. Adams*, 7 id. 131; affirmed, 52 N. Y. 409; *Palmer v. Foley*, 71 id. 106; *Dusenbury v. Keiley*, 35 id. 383; *Day v. Bach*, 87 id. 56.)

* * * * *

*Judgment affirmed.*¹

WOOD v. GRAVES.

(144 Mass. 365. — 1887.)

TORT, in three counts, against Josiah G. Graves and W. W. Bailey. At the trial in the Superior Court, before Knowlton, J., the jury returned a verdict for the plaintiff in the sum of \$7500; and the defendants alleged exceptions, which appear in the opinion.

P. Wadleigh and *P. E. Tucker* for the defendants.

A. W. Boardman for the plaintiff.

C. ALLEN, J. The three counts of the declaration are treated by the counsel for the defendants as being counts respectively

¹ A person who does no more than enter a complaint with a magistrate, who thereupon without jurisdiction issues a warrant, is not liable for false imprisonment. (*Langford v. B. & A. Ry.*, 144 Mass. 431; and cases in 54 Am. Dec. 265, n.)

for malicious prosecution, for false imprisonment, and for abuse of criminal process ; and the trial appears to have proceeded upon that ground. No question as to the form of the declaration has been raised. The court correctly ruled, upon the request of the defendant, that, upon the evidence, the plaintiff could not maintain an action for malicious prosecution, the prosecution not having brought to a termination. The principal questions arise upon the other requests by the defendants for instructions.

The court declined to rule that, upon the evidence, the plaintiff could not maintain an action for false imprisonment against either of the defendants. No action would lie for false imprisonment by reason of what was done in pursuance of the warrant of the governor in the extradition of the plaintiff from Massachusetts to New Hampshire, or of what was done in pursuance of any lawful precept issued upon the indictment in New Hampshire ; but if acts were done in excess of what was authorized, and if the process of the law was abused, the remedy might be by an action for false imprisonment. The court therefore properly declined to adopt the language of the defendants' second request, and all the rights of the defendants in respect to this were saved by the course of the instructions in relation to the wrongful use of process already commenced.

There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if, after an arrest upon civil or criminal process, the person arrested is subjected to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer, and against others who may unite with the officer in doing the wrong. It is sometimes said that the protection afforded by the process is lost, and that the officer becomes a trespasser *ab initio*. (*Esty v. Wilmot*, 15 Gray, 168 ; *Malcom v. Spoor*, 12 Met. 279.) This rule, however, is somewhat tech-

nical, and is hardly applicable to others than the officer himself. But the principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy not only against the officer whose duty it is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is *Grainger v. Hill*, 4 Bing. N. C. 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope. In *Page v. Cushing*, 38 Maine, 523, the same doctrine was held applicable to the abuse of criminal process. *Holley v. Mix*, 3 Wend. 350, is to the same effect, and it was held that an action for false imprisonment will lie against an officer and a complainant in a criminal prosecution, where they combine and extort money from a person accused, by operating upon his fears, though the person was in custody of the officer under a valid warrant, issued upon a charge of felony. The case of *Baldwin v. Weed*, 17 Wend. 224, was an action for false imprisonment. The plaintiff had been indicted in New York; he was arrested in Vermont, and carried to New York for trial. The defendant Weed procured the requisition, was present at the arrest, and caused the plaintiff to be put into irons, with the purpose to secure two small debts. The plaintiff executed to Weed a bond for the delivery of property much in excess of the debts. The action for malicious prosecution failed, but the court (Nelson, Ch. J.) declared that an action of trespass, assault and false imprisonment should have been brought, and was the appropriate remedy for the excess of authority and abuse of the

process ; and intimated to the plaintiff to amend his pleadings accordingly. (See also *Carleton v. Taylor*, 50 Vt. 220; *Mayer v. Walter*, 64 Penn. St. 283.) On similar grounds an officer becomes responsible in damage for abuse of process, or as trespasser *ab initio* by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care (*Adams v. Adams*, 13 Pick. 384), or who stays too long in a store where he has attached goods, (*Rowley v. Rice*, 11 Met. 337; *Williams v. Powell*, 101 Mass. 467; *Davis v. Stone*, 120 Mass. 228), or who keeps a keeper too long in possession of attached property, (*Cutter v. Howe*, 122 Mass. 541), or who places in a dwelling house an unfit person as keeper, against the owner's remonstrance. (*Malcom v. Spoor*, *ubi supra*.)

In various other cases, where it has been said that the only remedy was by an action for malicious prosecution, the whole grievance complained of consisted in the original institution of the process, and no abuse in the mere manner of serving it was alleged. Such cases are *Mullen v. Brown*, 138 Mass. 114; *Hamilburg v. Shepard*, 119 Mass. 30; *Coupal v. Ward*, 106 Mass. 289; and *O'Brien v. Barry*, 106 Mass. 300. The case of *Hackett v. King*, 6 Allen, 58, was trover for the conversion of property which the plaintiff conveyed to the defendant under alleged duress. In *Taylor v. Jaques*, 106 Mass. 291, the question arose in another form, the action being on the promissory note, in defence to which the defendant alleged that his signature was procured by duress. . . .

Judgment reversed on other grounds.

BOYCOTTING.

OLD DOM. S. S. CO. v. McKENNA.

(30 Fed. R. 48. — 1887.)

Samuel Ashton and Louis F. Post for defendants.

Clarence G. Seward for plaintiffs.

BROWN, J. This action was brought to recover \$20,000 damages, alleged to have been sustained by the plaintiff through the unlawful action of the defendants in the recent strike of the 'longshoremen, and in their attempt to boycott the plaintiff in its business as a common carrier. The defendants are alleged to constitute or to style themselves an "Executive Board of the Ocean Association of the 'Longshoremen's Union." At the time of the commencement of the action they were arrested and held to bail under orders of arrest issued in conformity with the state practice.

The defendants now move, upon the plaintiff's papers, only to vacate the order of arrest, on the ground that the material facts charged are alleged on information and belief only, without a sufficient statement of the sources of information; and the facts stated do not make out a *prima facie* case; that it appears that the defendants were acting within their legal rights, and that the plaintiff's loss, if any, is *damnum absque injuria*; and that, at best, the plaintiff's case is so doubtful that the order of arrest should not be sustained.

I have carefully considered the elaborate arguments of counsel, and examined the numerous authorities referred to. For lack of time I can only state my conclusions:

1. All the material averments are either stated positively or the source of information is sufficiently indicated.

2. The facts stated in the complaint and affidavit constitute a legal cause of action against all the defendants for the actual damages suffered, for the following reasons:

- (a) The plaintiff was engaged in the legal calling of common carrier, owning vessels, lighters and other craft used in its business, in the employment of which numerous workmen were necessary, who, as the complaint avers, were employed "upon terms as to wages which were just and satisfactory."

- (b) The defendants, not being in the plaintiff's employ, and without any legal justification, so far as appears, — a mere dispute about wages, the merits of which are not stated, not being any legal justification, — procured plaintiff's workmen in this city and in Southern ports to quit work in a body, for the purpose of inflicting injury and damage upon the

plaintiff until it should accede to the defendants' demands, and pay the Southern negroes the same wages as New York 'longshoremen, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work, being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable.

(c) After the plaintiff's workmen, through the defendants' procurement, had quit work, the defendants, for the further unlawful purpose of compelling the plaintiff to pay such a rate of wages as they might demand, declared a boycott of the plaintiff's business and attempted to prevent the plaintiff from carrying on any business as common carrier, or from using or employing its vessels, lighters, etc., in that business, and endeavored to stop all the dealings of other persons with the plaintiff by sending threatening notices or messages to its various customers and patrons, and to the agents of various steamship lines, and to wharfingers and warehousemen usually dealing with the plaintiff, designed to intimidate them from having any dealings with it through threats of loss and expense in case they dealt with plaintiff by receiving, storing or transmitting its goods or otherwise; and various persons were deterred from dealing with the plaintiff in consequence of such intimidations, and refused to perform existing contracts and withheld their former customary business, greatly to the plaintiff's damage.

(d) The acts last mentioned were not only illegal, rendering the defendants liable in damages, but also misdemeanors at common law as well as by section 168 of the Penal Code of this State.

(e) Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members or to interfere with, obstruct, vex or annoy them in working or in obtaining work because they are not members, or in order to induce them to become members, or designed to prevent employers from making a just discrimination in the rate of wages paid to the skilful and to the unskilful, to the diligent and to the lazy, to the efficient and to the inefficient; and all associa-

tions designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means and accompanied by damage are actionable.

(See Greenhood on Pub. Policy, 648, 653; *People v. Fisher*, 14 Wend. 9; *Tarlton v. McGrawly*, Peake, 205; *Rafael v. Verelst*, 2 W. Black. 1055; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333, 337; *Gregory v. Duke of Brunswick*, 6 M. & G. 205; *Gunter v. Astor*, 4 J. B. More, 12; *Queen v. Rollins*, 17 Ad. & El. (N. S.) 671; *Mogul Steamship Co. v. Macgregor*, 15 Q. B. D. 476; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1; *State v. Donaldson*, 3 Vroom (32 N. J. Law) 151; *Master Stevedore's Ass'n v. Walsh*, 2 Daly, 1, 13; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393; *S. C.* 60 How. Pr. 168; *Slaughter House Cases*, 16 Wall. 36, 116.)

3. There is no such doubt concerning the plaintiff's legal right as should debar it from the usual remedy.¹

The motion to discharge from arrest is therefore

Denied.

¹ This case is also reported in 18 Abb. N. C. 262, when the complaint and valuable briefs of counsel are given.

On the same general subject, see 21 Am. L. Rev. 509; *State v. Stewart*, 9 At. 559; 59 Vt. 273; *Sherry v. Perkins*, 147 Mass. 212; Note in 24 Abb. N. C. 260; *Heywood v. Tilson*, 75 Me. 227; *Payne v. Ry. Co.*, 13 Lea, 507; *Chipley v. Atkinson*, 23 Fla. 206; 1 So. R. 934.

LUCKE v. CLOTHING Co.

(77 Md. 306. — 1893.)

ROBERTS, J. . . . The appellant's engagement with Rosenfeld Bros. as a "customs cutter" commenced in the month of August, 1891, and continued to the month of February, 1892, and was to continue as long as his work proved satisfactory. His work gave entire satisfaction to his employers, who however retained the right to discharge him at the end of any week; but a member of the firm testified that they would not have discharged him but for the objection of the appellee. The appellee on the 16th of February, 1892, sent Rosenfeld Bros. a written notice, informing them "that in case the non-union man whom they had in their employ was any longer retained, it would be compelled to notify all labor organizations of the city that their house was a non-union one."

How many similar organizations there were in the city the record does not disclose, but the membership of the appellee is five hundred. This notice Rosenfeld Bros. construed to mean, that if they retained the appellant in their employ they would lose the patronage of the labor organizations, and that the union labor which they then employed would be ordered out, or they would have to quit work, the effect of which, as testified by Mr. Rosenfeld, would have been to cause his firm great loss, in consequence of their having a number of contracts on hand at that time. There are several inquiries which arise out of the facts just stated. First. Had the appellee justifiable cause in pursuing the course which it did in threatening said firm that if they retained the appellant any longer in their employ it would be compelled to notify all labor organizations of the city that their house was a non-union house? Second. Was the conduct of the appellee in the course pursued by it toward the appellant wrongful or malicious? Third. Had Rosenfeld Bros. reasonable grounds to anticipate loss or injury to themselves in consequence of the action of the appellee?

The first and second propositions can be considered together, as they are somewhat reciprocal in the relation they bear to

each other. It is contended on the part of the appellee that it did not, by the sending of the notice of February 16 to Rosenfeld Bros., contemplate any such course as that which has been attributed to it; and that the local law of the appellee and the general law of the order of the Knights of Labor prohibited the calling out of their members because of the employment of non-union men. If this be so, how are we to interpret the meaning of the written notice? What purpose did the appellee have in sending it, and what design was, through its agency, sought to be accomplished? This was no idle play in which they were involved. It related to the most serious right affecting a laboring man's life, which was the privilege of seeking remunerative employment, and thereby gaining an honest livelihood. Is it not unquestionably true, that but for the interference of the appellee, the appellant would not have been discharged? It is not necessary that such interference should have been malicious in its character. If it be wrongful, it is equally to be condemned, and just as much in violation of a legal right. In this case we think the interference of the appellee was in law malicious and unquestionably wrongful. The appellant was a man of family, a good workman, engaged in a lawful pursuit, performing his duties in an entirely satisfactory manner, without objection in any respect, and willing and desirous of becoming a member of the appellee if an opportunity had been afforded him. He was not able to obtain membership with the appellee, nor was he permitted to continue his work with his employers, who would gladly have retained him in their service if they could have done so without loss or embarrassment to themselves. Can it then be seriously questioned that from the evidence in this cause the appellee intended or expected any other or different result from the sending of the written notice than that which followed its reception by Rosenfeld Bros.? We are compelled to say that the notice had some meaning and purpose, and if not that which we have suggested, what was it? The testimony in this case assigns no other motive, and there is not the slightest information from any source that there is any. If therefore the appellee sought to bring about the discharge of the appellant under the circumstances detailed in the evidence, if not malicious, it was certainly wrong.

ful, and by so doing it has invaded the legal rights of the appellant, for which an action properly lies.

It is further contended by the appellee that it only meant by the notice sent Rosenfeld Bros. to say that unless they discharged the appellant it would withdraw the name of the New York Clothing House from the list of houses published in the *Critic*, which list had annexed to it a statement recommending said houses to the patronage of organized labor. Yet even this view of the letter contemplated the discharge of the appellant, and necessarily concedes that the sole purpose of the letter was to accomplish the appellant's discharge. In no view of the facts of this case have we been able to ascertain where the appellee derived its right to obtain by the means adopted the discharge of the appellant from his position with Rosenfeld Bros. The provision of law authorizing the creation of the appellee corporation provides for the formation of trades unions "to promote the well-being of their everyday life, and for mutual assistance in securing the most favorable conditions for the labor of their members and as beneficial societies." (Code, art. 23, § 37.) But when the State granted its generous sanction to the formation of corporations of the character of the appellee it certainly did not mean that such promotion was to be secured by making war upon the non-union laboring man, or by any illegal interference with his rights and privileges. The powers with which this class of corporations are clothed are of a peculiar character, and should be used with prudence, moderation and wisdom, so that labor in its organized form shall not become an instrument of wrong and injustice to those who, in the same avenue of life, and sometimes under less favored circumstances, are striving to provide the means by which they can maintain themselves and their families. It is essential to good government and the peace of society that correct legal principles be applied in the consideration of all questions, for it is undeniably true that wrong principles cannot and never do produce salutary remedies.

The third proposition can be disposed of without extended comment. We think Mr. Rosenfeld, in his testimony, has fairly and intelligently answered this inquiry. His long experience in business, and accurate knowledge of the various meth-

ods in vogue for the employment of labor in clothing houses, eminently qualify him to say whether his firm had just cause to apprehend the consequences of a refusal, under the circumstances, to discharge the appellant. Viewed by the light of all the circumstances surrounding the case we are compelled to say that there was reasonable cause to apprehend the result stated by Mr. Rosenfeld in his testimony. "Courts are bound to look at things just as they are, to pass on facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention." (*U. S. v. Kane*, 23 Fed. Rep. 750.)

Some criticism was indulged in in the argument of counsel in this court to the effect that a recovery could not be had in this cause, as the appellant had only declared on a supposed violation of a contract, when in point of fact there had been no contract violated. We concur in this view, and are clearly of opinion that the declaration sets out a cause of action which the proof fails to sustain. The question of a contract *vel non* enters into the consideration of this case, but upon proper averment in the declaration ought to play but small part in its determination. "Where a contract would have been fulfilled but for the false and fraudulent representation of a third person, an action will lie against such person, although the contract could not have been enforced by action." (*Benton v. Pratt*, 2 Wend. 385.)

In the case of *Harvester Co. v. Meinhardt*, 9 Abb. N. C. 396, 397, the court said: "A distinction has been sought to be made between the cases where there has been an unexpired time contract and cases where the services were by the day or by the piece, but I do not think such distinction rests upon any sound reason. . . . In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed as in the loss of profits derived from the work of the laborer if he continued in the employment, and the probability or certainty of such loss would be, in each case, a question of fact," and of course for the jury.

Mr. Addison, in his work on Torts (fols. 9-14) thus summarizes the law: "Interference by fraud or force with the free exercise of another's trade or occupation or means of livelihood

is a tort ; such as preventing people, by the use of threats or intimidation, from trading with the plaintiff's vessel in a foreign port, or dealing at the plaintiff's shop, or sending their children to the plaintiff's school, or placing obstructions or impediments in the way of free access to the plaintiff's place of business. . . . Where a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood, there an action lies in all cases."

Considerable comment was made at the hearing in this court of the analogy supposed to exist between the case made by the record in this case and the case of *Lumley v. Gye*, 2 El. & Bl. 216, but the cases widely differ in important facts, and there is but small analogy in the principles of law properly applicable in each case. The principles of law which are entitled to recognition in this case are too well settled and determined in a multitude of cases to require numerous citations for their support. The case of *Chiple v. Atkinson*, 23 Fla. 206, is strikingly like the case now under consideration. The court in that case says: "From the authorities referred to and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself not a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of the third party, to maliciously and wantonly procure the former to terminate or refuse to perform it. Such wanton and malicious interference for the mere purpose of injuring another is not the exercise of a legal right. Such other person, who is in employment by which he is earning a living, or otherwise enjoying the fruits and advantages of his industry or enterprise or skill, has a right to pursue such employment undisturbed by mere malicious or wanton interference or annoyance. Every one has a

perfect right to protect or advance his business if in so doing he infringes no superior legal right of another."

In *Bowen v. Hall*, 6 Q. B. Div. 338, it was said by Brett, J. (Lord Selborne concurring), that "merely to persuade a person to break his contract may not be wrongful in law or fact; . . . but if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury follows from it." The appellant, by the action of the appellee, lost his place in the month of February, and although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at \$5 less per week than he was receiving when he was discharged. It would be strange indeed if the law under such a state of facts as this record exhibits, provided no remedy. In *Winsmore v. Greenbank*, Willes, 581, it is said: "A special action on the case was introduced, for the reason that the law will never suffer an injury and a damage without a remedy." . . . We are therefore of opinion that upon proper amendment of the declaration there is evidence in the cause legally sufficient to be submitted to a jury.¹

1. In *Thomas v. Cin. Ry.* (62 Fed. R. 803, at p. 820,) Taft, J., said: A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. (*Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542.) What were the purposes of this combination of Debs, Phelan, and the American Railway Union board of directors? They proposed to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and, on the refusal of the railway companies to yield to compulsion, to inflict pecuniary injury on the railway companies by inciting their employees to quit their services, and thus paralyze their business. It could not have been unknown to the combiners that the Pullman cars were operated by the railway companies under contracts with Pullman. Such large transactions are never conducted without contracts saving the rights of both sides, and the combiners had every reason to believe that it would be a violation of those contracts for the companies to refuse further to haul Pullman cars in their trains. One purpose of the combination was to compel railway companies to injure Pullman by breaking their contracts with him. The receiver of this court

INJURIES IN FAMILY RELATIONS.

SIKES v. TIPPINS.

(85 Ga. 231. — 1890.)

BLANDFORD, J. This was an action brought by Tippins against Sikes for criminal conversation with his wife. Under the charge of the court, the jury found a verdict for the plaintiff. The defendant moved for a new trial, which was refused, and this he alleges as error.

is under contract to Pullman, which he would have to break were he to yield to the demand of Phelan and his associates. The breach of a contract is unlawful. A combination with that as its purpose is unlawful, and is a conspiracy. (*Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240.)

But the combination was unlawful without respect to the contract feature. It was a boycott. The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful, and the combination by which it is effected, an unlawful conspiracy. The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment and a boycott is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every State of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England.

1. The defendant contended that Tippins condoned the adultery of his wife by living with her after he had found out the same. The court below held that such condonation did not bar the plaintiff of his right to recover, and in this we think the court was right. The court further held that it was a matter to be taken into consideration by the jury in mitigation of damages, and we think this holding was fully as favorable to the defendant as he had any right to expect. In the case of *Verholf v. Van Houtenlengen*, 21 Iowa, 431, the Supreme Court of Iowa held that condonation of the wife's offence of adultery, or forgiveness by the husband of the wife, did not bar the plaintiff's right to recover as against the adulterer. The husband may forgive the wife, and yet he may not forgive the author of her defilement, and of his loss, wrong, and injury. The defendant can no more defeat the action upon the ground of condonation than he could upon a plea of recrimination, or the ground that his accuser had been guilty of the same offence. See *Bromley v. Wallace*, 4 Esp. 237; 2 Greenl. Ev. § 56. See, also, the case of *Sanborn v. Neilson*, 4 N. H. 501, in which case it was said: "As to the circumstances that the plaintiff lived with his wife after he had knowledge of her want of fidelity to his bed, this may be evidence that he had forgiven her offence, but is clearly no evidence that he had forgiven the offence of the defendant. . . . This circumstance could be no answer to the action." See, also, 2 Hil. Torts, 515, and *Smith v. Milburn*, 17 Iowa, 30. While condonation would defeat the plaintiff in an action for divorce against his wife, it is no bar to an action against her seducer. See, also, the case of *Stumm v. Hummel*, 39 Iowa, 483. The court in that case said that if the plaintiff, after a full knowledge of his wife's infidelity, continued to live with her upon the same terms as before her crime, this would be no evidence to show that the plaintiff connived at her infidelity; and the plaintiff's forgiveness of his wife, and continuance of the marital relation, did not necessarily have the effect to establish connivance or assent. "The law will not hold a party remediless for an injury of this kind because, through the exercise of Christian virtue, the influence of family interest, or even in the want of what may be regarded as true manly spirit, he forgives an erring wife, and trusts in her reformation and

promise of future good conduct and virtue." In *Michael v. Dunkle*, 84 Ind. 544, it was held that a husband may maintain an action of criminal conversation, although the intercourse took place after his final separation from his wife, and although a divorce had been granted to the wife for the cruelty of the husband. We think these cases fully establish the proposition that the husband's living with the wife after knowledge of her criminal conversation does not bar the husband's right to recover against her seducers, and therefore there was no error in the charge of the court below on this subject.

2. We think the verdict of the jury is amply sustained by the evidence, and that the amount thereof (\$1,400) was not excessive.

Judgment affirmed.

HAYNES v. NOWLIN.

(129 Ind. 581. — 1891.)

ELLIOTT, C. J. The question which this record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her, and alienates his affections? It was the boast of the common law that "there is no right without a remedy," and in the main this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial consideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support, and affections of her husband. The fiction that the *baron* and *feme* were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting

to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support; but, on the contrary, denied it, by holding that the wife might have a right of action against the wrong-doer who took her husband from her. To those cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrong-doer who deprives her of the society, support, and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law (and generally very justly) is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many, and such comprehensive, rights to the *baron*, and so few, and such narrow ones, to the *feme*, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid of statutory enactments the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress. The doctrine that the wife could not maintain an action against one who deprived her of her husband violates the old maxim that "reason is the life of the law," for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the strong may maintain an action, the greater the reason why the weak may do so. If the *baron* may recover from one who entices

away the *feme*, surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same, but the degree is not, for the reason intensifies in power when invoked by the injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration. (*Bennett v. Bennett*, 116 N. Y. 584; *Lynch v. Knight*, 9 H. L. Cas. 577; *Foot v. Card*, 58 Conn. 1.) The decisions to which we have referred, and the authorities they adduce, prove beyond debate that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest; and upon reason and principle she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that she and her husband were one, for from this fiction comes the stiff, unreasonable rule that in all actions she must join her husband. Equity, however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus—adopting the chancery doctrine and abrogating that of the common law—broke down the only position upon which it could with the slightest plausibility be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never asserted by the better considered cases nor by the abler text-writers that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right.

When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. . . . It seems to us very clear that, in view of the fact that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her. Every radical, express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the Legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this doctrine that, when the statutes gave a married woman the right to sue alone, and changed her *status* so as to invest her with the general property rights of a citizen and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society, and affections of the husband. In adjudging, as we do, that this action can be maintained, we believe that we build on solid principle, and we know that we are sustained by able courts. . . .

Judgment reversed.

CHAPTER VII.

DEFAMATION: ACTIONABLE WORDS.

POLLARD v. LYON.

(91 U. S. 225. — 1875.)

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Joseph H. Bradley and *Mr. A. G. Riddle* for the plaintiff in error.

Mr. Walter S. Cox for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Words both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff; and she sues in an action on the case for slander to recover damages for the injury to her name and fame.

Controversies of the kind, in their legal aspect, require pretty careful examination; and, in view of that consideration, it is deemed proper to give the entire declaration exhibited in the transcript, which is as follows:

“That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, spoke and published of the plaintiff the words following, ‘I saw her in bed with Captain Denty.’ That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following, ‘I looked over the transom-light and saw Mrs. Pollard,’ meaning the plaintiff, ‘in bed with Captain Denty’; whereby the plaintiff has been damaged and

injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars."

Whether the plaintiff and defendant are married or single persons does not appear; nor is it alleged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made, and the defendant appeared and pleaded the general issue; which being joined, the parties went to trial; and the jury, under the instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. None of the other proceedings in the case, at the special term, require any notice, except to say that the defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover; and the record shows that the court ordered that the motion be heard at General Term in the first instance. Both parties appeared at the General Term, and were fully heard; and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out the present writ of error.

Definitions of slander will afford very little aid in disposing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the

party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: (1) That the words set forth in the declaration are in themselves actionable, and consequently that the plaintiff is entitled to recover without averring or proving special damage. (2) That if the words set forth are not actionable *per se*, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offence, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence for which the party may be indicted and punished in this district; and the court is of the opinion that the words do not impute such an offence, for the reason that the declaration does not allege that either the plaintiff or the defendant was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offence by the provincial statute of the 3d of June, 1715, by which it was enacted that persons guilty of those offences, if convicted, should be fined and punished as therein provided. (Kilty's Laws, c. xxvii. secs. 2, 3.)

Beyond all doubt, offences of the kind involve moral turpitude; but the second section of the act which defined the offence of fornication was, on the 8th of March, 1785, repealed by the legislature of the State. (2 Kilty, c. xlvii. sec. 4.)

Sufficient is remarked to show that the old law of the province defining such an offence was repealed by the law of the State years before the Territory, included within the limits of the city, was ceded by the State to the United States; and inasmuch as the court is not referred to any later law passed by the State, defining such an offence, nor to any act of Congress to that effect passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal offence to the plaintiff for which she can be indicted and punished.

Suppose that is so: still the plaintiff contends that the words alleged, even though they do not impute any criminal offence to the plaintiff, are nevertheless actionable in themselves, because the misconduct which they *do* impute is derogatory to her character, and highly injurious to her social standing.

Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. (*Clements v. Chivis*, 9 Barn. & Cress. 174; *McClurg v. Ross*, 5 Binn. 219.)

Unwritten words, by all or nearly all the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offence, for which the party may be indicted and punished. Judges as well as commentators, in early times experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest that the incongruities are quite material, and, in some respects, irreconcilable. Nor are the decisions of the courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words which of themselves are actionable, said Lord Holt, must either endanger the party's life, or subject him to infamous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added at least the thing charged must "in itself be scandalous." (*Ogden v. Turner*, 6 Mod. 104.)

Viewed in any proper light, it is plain that the judge who gave the opinion in that case meant to decide that words, in order that they may be actionable in themselves, must impute to the party a criminal offence affecting the social standing of the party, for which the party may be indicted and punished.

Somewhat different phraseology is employed by the court in the next case to which reference will be made. (*Onslow v. Horne*, 3 Wil. 186.) In that case, DeGray, Ch. J., said the first rule to determine whether words spoken are actionable is, that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor, and that the charge must be precise. Either the words themselves, said Lord Kenyon, must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning; otherwise they are not action-

able. (*Holt v. Scholefield*, 6 Term, 694.) Separate opinions were given by the members of the court in that case; and Mr. Justice Lawrence said that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor; and he denied that the meaning of words not actionable in themselves can be extended by an innuendo. (4 Co. 17 b.)

Prior to that, Lord Mansfield and his associates held that words imputing a crime are actionable, although the words describe the crime in vulgar language, are not in technical terms; but the case does not contain an intimation that words which do not impute a crime, however expressed, can ever be made actionable by a colloquium or innuendo. (*Colman v. Godwin*, 3 Doug. 90; *Woolnoth v. Meadows*, 5 East, 463.)

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice to say, that it was during the period of such uncertainty as to the rule of decision when a controversy bearing a strong analogy to the case before the court was presented for a decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that bench.

Allusion is made, in the opinion given by Judge Spencer, to the great "uncertainty in the law upon the subject," and, having also adverted to the necessity that a rule should be adopted to remove that difficulty, he proceeds, in the name of the court, to say, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very extensively adopted in the courts of other States. (*Brooker v. Coffin*, 5 Johns. 190; 1 Am. Lead. Cas. (5th ed.) 98.)

When he delivered the judgment in that case, he was an associate judge of the court, Chancellor Kent being the chief justice, and participating in the decision. Fourteen years later,

after he became chief justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. (*Van Ness v. Hamilton*, 19 Johns. 367.)

On that occasion he remarked, in the outset, that there exists a decided distinction between words spoken and written slander; and proceeded to say, in respect to words spoken, that the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude; and, in our judgment, the rule applicable in such a case is there stated with sufficient fullness, and with great clearness and entire accuracy.

Controverted cases involving the same question, in great numbers, besides the one last cited, have been determined in that State by applying the same rule, which, upon the fullest consideration, was adopted in the leading case, — that in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable.

Attempt was made by counsel in the case of *Widrig v. Oyer*, 13 Johns. 124, to induce the court to modify the rule by changing the word “or” into “and;” but the court refused to adopt the suggestion, and repeated and followed the rule in another case reported in the same volume. (*Martin v. Stillwell*, 13 id. 275. See, also, *Gibbs v. Dewey*, 5 Cowen, 503; *Alexander v. Dewey*, 9 Wend. 141; *Young v. Miller*, 3 Hill, 22; in all of which the same rule is applied.)

Other cases equally in point are also to be found in the reported decisions of the courts of that State, of which one or two more only will be referred to. (*Bissell v. Cornell*, 24 Wend. 354.) In that case, the words charged were fully proved; and the defendant moved for a nonsuit, upon the ground that the words were not in themselves actionable; but the circuit judge overruled the motion, and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the State, Nelson, Ch. J., giving the opinion of the court, in which

it was held that the words were actionable; and the reason assigned for the conclusion is, that the words *impute an indictable offence involving moral turpitude*.

Defamatory words to be actionable *per se*, say the court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction *merely*, but the offence charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such, as, if true, would subject the party charged to an infamous punishment; but the Supreme Court of the State refused so to hold. (*Widrig v. Oyer*, 13 Johns. 124; *Wright v. Page*, 3 Keyes, 582.)

Subject to a few exceptions, it may be stated that the courts of other States have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fornication as a crime, or providing that words imputing incontinence to an unmarried female shall be construed to impute to the party actionable misconduct.

Without the averment and proof of special damage, says Shaw, Ch. J., the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offence punishable by law. (*Dunnell v. Fiske*, 11 Met. 552.)

Speaking of actions of the kind, Parker, Ch. J., said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to a disgraceful punishment, or imputing to him some foul and loathsome disease which would expose him to the loss of his social pleasures, are actionable, without any special damage; while words perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a *colloquium*, to some office, business or trust which would probably be injuriously affected by the truth of such imputations. (*Chaddock v. Briggs*, 13 Mass. 252.)

Special reference is made to the case of *Miller v. Parish*, 8 Pick. 385, as authority to support the views of the plaintiff; but the court here is of the opinion that it has no such ten-

dency. What the court in that case decided is, that whenever an offence is imputed, which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable; which is not different in principle from the rule laid down in the leading case, — that if the charge be such that, if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history, the legislature of Massachusetts defined the act of fornication as a criminal offence, punishable by a fine, and which may be prosecuted by indictment; and, if the person convicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage; but the court held that, inasmuch as the words alleged imputed a criminal offence which subjected the party to punishment involving disgrace, the words were actionable; and it is not doubted that the decision is correct. Exactly the same question was decided by the same court in the same way twenty-five years later. (*Kenney v. Laughlin*, 3 Gray, 5; 1 Stat. Mass. 1786, 293.) Other state courts, where the act of fornication is defined by statute as an indictable offence, have made similar decisions; but such decisions do not affect any question involved in this investigation. (*Vandcrip v. Roe*, 23 Penn. St. 182; 1 Am. Lead. Cas. (5th ed.) 103; *Simons v. Carter*, 32 N. H. 459; Sess. Laws (Penn. 1860) 382; Purdon's Dig. 1824, 313.)

That the words uttered import the commission of an offence, say the court, cannot be doubted. It is the charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff, and exclude her from society. Though the imputation of crime, said Bigelow, J., is a test whether the words spoken do amount to legal slander, yet it does not take away their actionable quality if they are so used as to indicate that the party has suffered the penalty of the law, and is no longer exposed to the danger of punishment. (*Krebs v. Oliver*, 12 Gray, 242; *Fowler v. Dowdney*, 2 M. & Rob. 119.)

Courts affixed to words alleged as slanderous their ordinary

meaning; consequently, says Shaw, Ch. J., when words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. (*Alexander v. Angle*, 1 Crompt. & Jer. 143; *Goldstein v. Foss*, 1 Younge & Jer. 146; *Carter v. Andrews*, 16 Pick. 5; *Beardsley v. Tappan*, 2 Blatch. 588.)

Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might otherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or colloquium. (*Gosling v. Morgan*, 32 Penn. St. 275; *Shafter v. Kinster*, 1 Binn. 537; *McClurg v. Ross*, 5 id. 218; *Andreas v. Koffenhefer*, 3 S. & R. 255.)

State courts have in many instances decided that words are in themselves actionable whenever a criminal offence is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings disgrace upon the complaining party; but most courts agree that no words are actionable *per se* unless they impute to the party some criminal offence which may be visited by punishment either of an infamous character, or which is calculated to affect the party injuriously in his or her social standing. (*Buck v. Hersey*, 31 Me. 558; *Mills v. Wimp*, 10 B. Monr. 417; *Perdue v. Burnett*, Minor, 138; *Demarest v. Haring*, 6 Cow. 76; Townsend on Slander,

sec. 154 ; 1 Wendell's Stark. on Slander, 43 ; *Redway v. Gray*, 31 Vt. 297.)

Formulas differing in phraseology have been prescribed by different courts ; but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of *Brooker v. Coffin*, appear "to have reached the true principle applicable to the subject ;" and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offence for which the party may be indicted and punished, even though the offence is not technically denominated infamous, if the charge involves moral turpitude, and is such as will affect injuriously the social standing of the party. (1 Am. Lead. Cas. (5th ed.) 98.)

Decided support to that conclusion is derived from the English decisions upon the same subject, especially from those of modern date, many of which have been very satisfactorily collated by a very able text-writer. (Addison on Torts (3d ed.) 765.) Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander. Written slander is punishable in certain cases, both criminally and by action, when the mere speaking of the words would not be punishable in either way. (*Villiers v. Mousely*, 2 Wils. 403 ; *Saville v. Jardine*, 2 H. Bl. 532 ; Bac. Abr. Slander, B. ; *Keiler v. Sessford*, 2 Cr. C. C. 190.)

Examples of the kind are given by the learned commentator ; and he states that verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage ; but, if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable. (2 Bl. Com. 125, n. 6 ; *Janson v. Stuart*, 1 Term, 784.)

Comments are made in respect to verbal slander under several heads, one of which is entitled defamatory words not actionable without special damage ; and the commentator proceeds to remark that mere vituperation and abuse by word of mouth,

however gross, is not actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case. (*Lumby v. Allday*, 1 Crompt. & Jer. 301; *Barnet v. Allen*, 3 H. & N. 376.)

Even the judges holding the highest judicial stations in that country have felt constrained to decide; that to say of a married female that she was a liar, an infamous wretch and that she had been all but seduced by a notorious libertine, was not actionable without averring and proving special damage. (*Lynch v. Knight*, 9 H. of L. Cas. 594.)

Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable, even when special damage is alleged, unless *it is proved*, and the proposition is fully sustained by the cases cited in its support. (*Welby v. Elston*, 8 M. G. & S. 142; Addison on Torts (3d ed.) 789; Townsend on Slander, secs. 172 and note, 516-518.)

Words actionable in themselves, without proof of special damage, are next considered by the same commentator. His principal proposition under that head is that words imputing any indictable offence are actionable *per se* without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penalties of the criminal law. Beyond question, the authorities cited by the author support the proposition, and show that such is the rule of decision in all the courts of that country having jurisdiction in such cases. (*Heming v. Power*, 10 Mees. & Wels. 570; *Alfred v. Farlow*, 8 Q. B. 854; *Edsall v. Russell*, 5 Scott N. R. 801; *Brayne v. Cooper*, 5 Mees. & Wels. 250; *Barnet v. Allen*, 3 H. & N. 378; *Davies v. Solomon*, 41 Law Jour. Q. B. 11; *Roberts v. Roberts*, 5 B. & S. 389; *Perkins v. Scott*, 1 Hurlst. & Colt. 158.)

Examined in the light of these suggestions and authorities cited in their support, it is clear that the proposition of the plaintiff, that the words alleged are in themselves actionable, cannot be sustained.

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that she "has been damaged and injured in her name and fame;" and she contends that that averment is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form, and the allegation is sustained by sufficient evidence; but the claim must be specially set forth, in order that the defendant may be duly notified of its nature, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. (*Haddan v. Scott*, 15 C. B. 429.)

Whenever proof of special damage is necessary to maintain an action of slander, the claim for the same must be set forth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover. (*Vicars v. Wilcox*, 8 East, 3; *Knight v. Gibbs*, 1 Ad. & Ell. 46; *Ayre v. Craven*, 2 id. 8; *Roberts v. Roberts*, 5 B. & S. 389.)

When special damage is claimed, the nature of the special loss or injury must be particularly set forth, to support such an action for words not in themselves actionable; and, if it is not, the defendant may demur. He cannot demur in the case last cited; and Cockburn, Ch. J., remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. (Addison on Torts (3d ed.) 805; *Wilby v. Elston*, 8 C. B. 148.)

Where the words are not in themselves actionable, because the offence imputed involves neither moral turpitude nor sub-

jects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. (*Hoag v. Hatch*, 23 Conn. 590; *Andres v. Koppenheaver*, 3 S. & R. 256; *Buys v. Gillespie*, 2 Johns. 117.)

In such a case, it is necessary that the declaration should set forth precisely *in what way* the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered *special damages*, or that the party has been put to great costs and expenses. (*Cook v. Cook*, 100 Mass. 194.)

By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. (*Moore v. Meagher*, 1 Taunt. 42; *Williams v. Hill*, 19 Wend. 306.)

Illustrative examples are given by the text-writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits or customers; and it was very early settled that a charge of incontinence against an unmarried female, *whereby she lost her marriage*, was actionable by reason of the special damage alleged and proved. (*Davis v. Gardiner*, 4 Co. 16 b, pl. 11; *Reston v. Pomfreicht*, Cro. Eliz. 639.)

Doubt upon that subject cannot be entertained; but the special damage must be alleged in the declaration, and proved; and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is all that is alleged in that regard in the case before the court. (*Hartley v. Herring*, 8 Term, 133; Addison on Torts, 805; Hilliard on Remedies (2d ed.) 622; *Beach v. Ranney*, 2 Hill, 309.)

Tested by these considerations, it is clear that the decision of the court below, that the declaration is bad in substance, is correct.

Judgment affirmed.

ALEXANDER v. JENKINS.

(1892. — 1 Q. B. 797.)

LORD HERSHELL. This action raises a question of some novelty, and not without its importance. The action was brought by the plaintiff, who had been elected town councillor. It is an action of slander in which the defendants are charged with having said that the plaintiff was "never sober, and not a fit man for the council." The verdict was found for the plaintiff, and the jury must be taken to have found that those words were in fact used. But the defendants appealed against the judgment which was entered for the plaintiff, on the ground, that assuming those words to have been used, under the circumstances in which they are alleged to have been used, an action of slander will not lie. Now I think it must be taken that those words are not mere words of abuse, but that they do impute to the plaintiff, who had been elected a town councillor that he was an habitual drunkard, and that as an habitual drunkard he was not a fit man to discharge the duties of a town councillor. The question is whether, in respect of such an imputation, an action will lie. The charge is not one made against the plaintiff of any misconduct in his office, or any acts done by him as an officer which he ought not to do. But it is simply a charge of unfitness to hold the office to which he had been elected on account of moral misconduct. Now, I think that no one can examine the authorities upon the law of slander without seeing that there are a number of distinctions to be found which cannot be supported on any satisfactory principle. Obviously the idea lying at the root of the distinction between slander and libel is this, that it would never do to permit of actions being brought in respect of every word spoken which might reflect on the character or conduct of another. But, on the other hand, it was considered necessary to put some qualification on this by enabling an action to be brought where the charges were of a certain gravity, and likely to be pecuniarily injurious, and in certain cases injurious in another fashion, to which I will allude presently. Of course where special damage can be shown

the action will lie. We are now only dealing with a case which assumes that the plaintiff cannot show, or has not shown, any special damage. But in all cases in which the action has been held maintainable, the nature of the rules which have been laid down is itself a certain check against an indiscriminate use of the law of slander. Now, I may put aside the actions which are brought in respect of an imputation that a man has been guilty of a crime, and I will deal only with those which impute to him misconduct in relation to some office or employment. It is quite clear that, as regards a man's business or profession, or calling, or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. Immoral or disgraceful conduct is unnecessary, because the one may as much lead to his suffering in his calling as the other. Therefore in that class of cases there can be no doubt that an action will lie. In *Lumby v. Allday*, 1 C. & J. 301, Bayley, B., said: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade or business." It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who by reason of his want of ability or honesty is unfit to hold the office. So much with regard to offices of profit, the reason being that in all those cases the court will presume—or the law will presume perhaps I should rather say—such a probability of pecuniary loss from such imputation in that office, or employment, or calling, or profession, the special damage will not be required to be shown. It may be said to be an arbitrary rule. Be it so, but the rule is at all events so laid down, and seems to me to rest on that basis. But when you come to offices that are not offices of profit, the loss of which therefore would not involve necessarily a pecuniary loss, the law has been differently laid down. And it is quite clear that the mere imputation of want of ability or capacity, which would be actionable if made in the case of a person holding an office of profit, is not actionable in the case of a person holding an office which has been called an "office of credit" or an "office of honor."

Now, in his work on the law of slander and libel, Mr. Starkie points out that the distinction which has been drawn is not by any means satisfactory. I think nobody can read the cases without feeling that to be so. The ground upon which Holt, C. J., puts it is, that a man cannot make himself wiser or more able than he is; he cannot add to his ability, but he may make himself a better man. That is not a very satisfactory foundation on which to rest a legal distinction. But however it may be, there it is, and I feel very strongly in this case what was said by Pollock, C. B., in delivering the judgment of the court in the case of *Gallwey v. Marshall*, 9 Ex. 294, that we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle. But where you are dealing with such an artificial law as the law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the court. Now it has, as I have already said, been held that in the case of imputations made on those holding offices of honor or credit, as compared with imputations made on those holding offices of profit, there is a distinction between that which is actionable and that which is not so. The ground upon which the action has been said to be maintainable, certainly in some of the authorities, would seem to be this: that the language used has been such as, if true, would show that the man referred to ought to be deprived of his office, and therefore involves a risk of exclusion from that office. No case, I think, has now been cited to the court which cannot be supported on that ground. In the case of an imputation on a justice of the peace (*Bill v. Neal*, 1 Lev. 52), there was certainly a risk of deprivation. The language used, if true, would have justified deprivation, and shown that it was proper, and perhaps necessary. So in the case of the action by a churchwarden (*Jackson v. Adams*, 9 Bing. N. C. 402), where there was an imputation on him of misconduct in his office, he too might have been deprived. But, as I have said, it is not neces

sary to go so far to-day as to deal with the case of an imputation on a man of misconduct in his office. All we have to deal with is merely an imputation of unfitness for the office. And there is no case in which an action of slander has been held to lie for an imputation that a man by reason of his conduct is unfit for an office, except where by reason of that misconduct, if it existed, he could have been deprived of the office. In Mr. Starkie's work this liability — this danger of exclusion from office — is stated to be that which gives rise to the action, and at all events, there is there an intelligible ground upon which these actions may be rested, even if it be not altogether a satisfactory one. But we are asked to-day to make an extension, and to say that an action will lie where a person is charged with being unfit for the office, notwithstanding that he could not — however true the charge — be excluded from that office. That would be a step in advance, and I do not think it is a step in advance which we are justified in taking. It is on that ground that I desire exclusively to rest my judgment. To put it shortly, it is this : Where an imputation made against a person is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which he is said to be unfit is not an office of profit, but one merely of what has been called honor or credit, an action will not lie unless the misconduct charged be such as would enable him to be removed from or deprived of that office. It follows therefore that in the present case the action is not maintainable.

REPETITION OF SLANDER.

ELMER v. FESSENDEN.

(151 Mass. 359. — 1890.)

TORT for slander. The declaration alleged that the defendant, who was a physician, falsely informed certain employees of the plaintiff, who was a manufacturer of whipsnaps from silk thread, that the silk thread which was furnished them by the plaintiff, and which they were compelled to manipulate in their work, contained arsenic, as a result of which information they ceased to work for the plaintiff; and that the plaintiff had suffered in the loss of their services certain specified damage in his business. The answer contained a general denial, and also alleged that whatever words were spoken were privileged.

H. Winn for the plaintiff.

J. A. Aiken for the defendant.

HOLMES, J.

* * * * *

2. It is argued that the defendant was answerable for the repetition of such a story as this, on the ground that any one who heard it was morally bound to repeat it to the workmen. The general rule, that a man is not liable for a third person's actionable and unauthorized repetition of his slander, is settled. (*Hastings v. Stetson*, 126 Mass. 329, 331. *Shurtleff v. Parker*, 130 Mass. 293, 296.) If the repetition is privileged, the question becomes somewhat different. It is true that the fact that the sufferer has no action against one person is not a sufficient reason for giving him one against another, even if otherwise he is remediless. But the case is withdrawn from the principle applied in many instances, that the law will look no further back than to the wrong-doer, who is the proximate cause of the consequence complained of. (*Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 49.) We need not now decide that, when the original slander was uttered under such circumstances

that the privileged repetition manifestly was to be expected, the damage caused by the repetition could not be recovered for to the same extent as if the defendant had repeated the slander himself. (Compare *Derry v. Handley*, 16 L. T. (N. S.) 263; *Parkins v. Scott*, 1 H. & C. 153; *Keenholts v. Becker*, 3 Denio, 346, 352; *Terwilliger v. Wands*, 17 N. Y. 54, 59; *Fowles v. Bowen*, 30 N. Y. 20, 22; *Titus v. Sumner*, 44 N. Y. 266; *Bassell v. Elmore*, 48 N. Y. 561.)

In the case before us, it did not appear that the repetition was privileged. Assuming that the story heard by Anna M. Brackett was the one set in motion by the defendant, there was no evidence as to how it came from him to her. He may have uttered it to a stranger, and it may have passed through twenty mouths before it reached the plaintiff's workmen. We do not know whether those who repeated it believed it, or whether any one of them made it in pursuance of a supposed duty, or, if a stranger and a volunteer under any circumstances could make out a case of privilege, whether such circumstances existed. (See *Shurtleff v. Parker*, 130 Mass. 293; *Joannes v. Bennett*, 5 Allen, 169, 171; *Krebs v. Oliver*, 12 Gray, 239, 243; *Waller v. Loch*, 7 Q. B. D. 619, 621; *Davies v. Snead*, L. R. 5 Q. B. 608, 611.) It cannot be contended that any one who heard the story was under such a moral obligation to repeat it broadcast without further inquiry, that the defendant must be taken to have contemplated and authorized the repetition until at last it reached the plaintiff's workmen.

Exceptions sustained.

WHAT IS PUBLICATION ?

KIENE v. RUFF.

(1 Iowa, 482. — 1855.)

Thomas S. Wilson and *L. A. Thomas* for the appellant.

James Burt for the appellee.

ISBELL, J. The counsel for the defendant have insisted at great length, in this case, that the cause of action accrued in a foreign country, and that, therefore, it can be maintained only on the comity of nations; and that in order to do this, the plaintiff must show affirmatively, by the laws of the foreign country, that the acts charged to have been committed by the defendant, constitute an injury for which the courts of that country can afford redress. Several specifications of error, all going to this end, are relied upon; but we are unable to see that the questions involved in them arise upon the record. The declaration charges a writing and publication in Dubuque, in the State of Iowa, as well as a publication in Switzerland. All the evidence is not pretended to be before this court. In this state of the case, the presumption is in favor of the correctness of the finding, and hence we would be justified in presuming that proof of a publication in Dubuque was properly adduced. But we are not left to presumption. Enough of the evidence is before the court to show affirmatively that a publication in Iowa was proved. The testimony of Wildput, who is found by the referees as worthy of credit, shows satisfactorily that defendant furnished a copy of the libellous matter for him to transcribe. The transcript made by the witness was the copy forwarded from Dubuque to Switzerland. If this witness understood the German language, and that he did understand it, from the evidence before us we have no doubt, we fail to see why there was not a complete publication in Iowa. In the case of *Baldwin v. Elphinstone*, in the exchequer, 2 Bl. 1037, in considering the question, after verdict, whether the allegation that the defendant *printed and caused* to be printed in the St. James Chronicle, was equivalent to a charge of having *published* the alleged libel, it was held unanimously by the justices and barons of the exchequer, that it was; and in doing so, they laid stress upon the words, *caused to be printed*, because they contemplated the calling in of a "third person as agent, to whom the libel must have been communicated." In the case before us, Wildput being procured to copy the libellous matter, was clearly an agent to whom the libellous matter was communicated.

In the case of *The King v. Burdett*, 5 Bac. Abr. 210, citing 3 Barn. & A. 717, the question of what shall amount to a publication was fully discussed, and it was held (Bailey, J., doubting) that a defendant, writing and composing a libel in one country, with intent to publish, and afterwards publishing it in another, may be indicted in either. And also that a delivery of a sealed letter, containing a libel, at the post-office, is a publication there. But we are not required to go the length of this authority in sustaining the case before us. We conclude, therefore, that the assumption that the cause of action arose in a foreign country is not well founded, and that all the specifications of error based on this foundation must fail.

Again, it is insisted that plaintiff, in order to sustain his case, must show by proper evidence, that Spracher, the person to whom this libellous letter was directed in Switzerland, understood the German language. In this we do not concur. It was necessary that the referees should be satisfied from the evidence that the language in which the libel was couched, was understood by some person to whom it came in Switzerland, to entitle plaintiff to any damage for a publication there. But we do not hold that it was necessary to show that Spracher understood the German language to entitle the plaintiff to recover.

It is also assigned as error, and insisted upon, that plaintiff, having failed to allege in his declaration, that the person to whom said letter was sent was a German by birth or education, or that he understood the German language, he was not entitled to produce the letter in evidence. If this specification of error is intended to be insisted upon in terms as stated, it is already sufficiently answered; for it was not essential to a recovery that "the person to whom it was sent," in Switzerland, understood the German language, if there was a complete publication before sending it. Under the view we take of the case, the proof of a publication in Switzerland was necessary for the purpose of enhancing damage only. But counsel for defendant, in their argument, have taken a much wider range than is covered by the assignments of error. They have treated this assignment as though it were that the court erred by permitting the letter to be read in evidence,

without an averment in the declaration, that some person to whom it came understood its meaning. To allow it to be *read in evidence*, under the state of the pleadings, we do not regard as an error. No variance is relied upon between the letter and the matter set out in the declaration. Certain words are averred to be written and published, and the writing is produced to prove them. It would be quite another question, whether proof might be adduced to show that those to whom the letter came understood it. But no question is raised as to the introduction of testimony to that end; but rather the objection is, that such evidence was not furnished. Again, it would be a different question, whether the declaration was demurrable for the want of this averment. But, although defendant demurred to the declaration for another cause, he failed to do so for this. Again, it is still another question, whether *judgment should be arrested* for the want of such averment.

While it has been held that if words are *spoken* in a foreign language, it will be good in arrest, that there is no averment that the hearers understood them (1 Starkie on Slander, 361), and that a nonsuit was properly granted where the words were charged in the English language, and it turned out on proof that they were spoken in German (*Warmouth v. Cramer*, 3 Wend. 395); yet these were cases of verbal slander. There is a substantial difference in this respect, we apprehend, between such publishing of words, which must die with the breath that gives them utterance, in case they are not understood, and written slander, which lives, and continues to be susceptible of being understood, until the document containing it shall be destroyed. We are not prepared to hold, in the absence of direct authority, that in a civil case, such a publication as is charged in this case, to wit, to the injury of plaintiff, is after verdict insufficient. The substance of the declaration is, that defendant published the writing containing the words set forth in the declaration to plaintiff's injury. Having taken issue on this, without objection, for the want of such averment, we think it is too late to set it up now, particularly as our statute provides that no variance, error or defect shall be deemed material, unless the court is satisfied that the object-

ing party will be prejudiced by disregarding it, or by allowing it to be amended. (Code, sec. 1758.) There can be no publication, unless the libellous matter is made to be understood. At least, then, after verdict, we think that the averment of publication should be held sufficient.

Finally, counsel have insisted that no injury accrued from this publication, because the character of *Schinderhans* is held in two estimations, — one good, and the other bad. We are satisfied that, without the matter comparing the plaintiff to this individual, the publication was clearly libellous; and from the tone of the whole letter there can be no two opinions among all who may read the communication, as to whether the writer intended the good or bad sense.¹

The judgment is affirmed

INNUENDO.

COOPER v. GREELEY.

(1 Den. 347. — 1845.)

THE declaration alleged the publication by defendants of an article containing this language: "There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring this action to trial somewhere. He will not bring it in New York, for we are known here, nor in Otsego, for he is known there." An *innuendo* averred the meaning to be that the plaintiff, in consequence of being known in the county of Otsego, was in bad repute there, and would not for that reason like to bring a suit for libel in that county.

¹ Cf. *Mielenz v. Nuasdorf*, 68 Ia. 726, that libel in German must be shown to have been read by one who understands the language. It is not publication to send a libellous letter sealed, by mail, to the one libelled. (*Spaits v. Poundstone*, 87 Ind. 522; *Lyle v. Clason*, 1 Calnes, 581.) See *Tompson v. Dashwood*, 11 Q. B. D. 43; nor to show the libel to writer's wife (*Wennehak v. Morgan*, 20 Q. B. D. 635). For rule in criminal cases see *State v. Avery*, 7 Conn. 267. The number of copies of libel sold may be shown to increase damages (*Bigelow v. Sprague*, 140 Mass. 425). Liability of news vendor (*Emmons v. Pottle*, 16 Q. B. D. 354).

The defendants, besides the general issue, pleaded several special pleas, to each of which plaintiff demurred.

R. Cooper for plaintiff.

A. B. Conger and *W. H. Seward* for defendant.

JEWETT, J. The defendants contend that the publication set forth in this count is not libellous. For the plaintiff it is insisted that it contains a charge that he was in bad repute in the county of Otsego, in consequence of being known in that county, and that on that account he would not like to bring a libel suit to trial there. The inquiry is, how is this publication to be understood? It is the duty of the court, in an action for libel, to understand the publication in the same manner as others would naturally do. "The construction which it behooves a court of justice to put on a publication which is alleged to be libellous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer." (*Spencer v. Southwick*, 11 John. R. 592, per Van Buren, Senator; see, also, *Fidler v. Delavan*, 20 Wend. 57.) It seems to me that the *innuendo* affixes the true meaning to the words. It may be admitted that the charge is not made in an open and direct manner. It seems to be ironical. But an imputation conveyed in that form is not the less actionable. The sting of the words in this case is in the imputation which it is alleged they convey, that the plaintiff had acquired so odious a reputation in Otsego County that, knowing enough of the influence of human action justly to apprehend danger to himself for that cause upon such a trial there, he would not dare to risk a trial in that county. Assuming this to be the true meaning of the publication, the inquiry follows, whether such language with such meaning and application is libellous within the rules of law applicable to the action for libel. The counsel for the defendants, although they did not admit on the argument that even such language could be considered libellous within their understanding of what they denominated the modern definition of libel, yet undertook to show by argument and authority that

at the period when the late Chancellor Kent, and Chief Justice Spencer, and their associates, held seats in this court the rule in regard to what published words amounted to a libel was, more than forty years ago, greatly and unjustly extended. The definition of a libel submitted *arguendo* by the late General Hamilton, and adopted by the court in *The People v. Croswell*, 3 John. Cas. 354, and subsequently approved by the court in *Steele v. Southwick*, 9 John. R. 215, is complained of as erroneous. The court in the case last cited said that "a writing published maliciously with a view to expose a person to contempt and ridicule is undoubtedly actionable; and what was said to this effect by the judges of the C. B. in *Villers v. Monsley*, 2 Wils. 403, is founded in law, justice and sound policy. The opinion of the court in the case of *Riggs v. Denniston*, 3 John. Cas. 205, was to the same effect; and the definition of a libel as given by Mr. Hamilton in the case of *People v. Croswell*, 3 John. Cas. 354, is drawn with the utmost precision. It is a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals. To allow the press to be the vehicle of malicious ridicule of private character would soon deprave the moral taste of the community, and render the state of society miserable and barbarous." In the case of *Cropp v. Tilney*, 3 Salk. 226, Holt, Ch. J., said, "Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be held of the plaintiff, or to make him contemptible or ridiculous." Any written slander, though merely tending to render the party subject to disgrace, ridicule or contempt, is actionable, though it do not impute any definite crime punishable in the temporal courts. (3 Bl. Comm. (Chitty's ed.) 123, note 5.)

But it is argued that the publication in question is not libelous, even admitting the definition of libel adopted by this court in *The People v. Croswell* and in *Steele v. Southwick*. It is denied that it is a censorious or ridiculing writing; and although it is conceded that it reflects upon the plaintiff, it is said that it does not do so in a *severe* or censorious manner; and that it does not convey any sentiment of ridicule. The admission that the publication reflects upon the plaintiff,

though qualified by the remark, that it does not do so severely, yields the material point in controversy. The degree of censure or ridicule does not enter into the definition. "A censorious or ridiculing writing towards an individual" is defined to be a libel, "if made with a mischievous and malicious intent." "Censoriousness" is defined by Webster to be a "disposition to blame and condemn; the habit of censuring or reproaching." He defines the word "reflect," in his fifth subdivision, thus: "to bring reproach; to reflect on; to cast censure or reproach." It would seem to me that if a censorious writing made with a mischievous and malicious intent towards an individual is libellous, a writing made with a like intent reflecting upon an individual, whether more or less severely, would be none the less libellous. But I do not think that the rule requires any such aid. It is enough that we approve of the rule as settled, acted upon and undeviatingly adhered to by this court for about forty years. . . . The *innuendo* in this case, which states the meaning of the publication to be that the plaintiff, in consequence of being known in the county of Otsego, was in bad repute there, and would not for that reason like to bring a suit for a libel in that county, appears to me to express the true meaning of the publication. The question whether the alleged libel was published of and concerning the plaintiff, and whether the true meaning of the words is such as is alleged in the *innuendo* or not, is a question of fact which belongs to the jury and not to the court to determine. (*Van Vechten v. Hopkins*, 5 John. R. 221; *Goodrich v. Woolcot*, 3 Cowen, 231; *Peake v. Odham*, Cowp. 275; 2 Bl. R. 961; *Dexter v. Taber*, 12 John. R. 239.) It is well settled that where the slanderous charge may be collected from the words themselves or from the general scope of the publication, it is not necessary to make any averment as to circumstances to the supposed existence of which the words refer. So where the libellous meaning is apparent on the face of the declaration, *innuendoes* and averments are unnecessary; but if introduced and not warranted by the subject matter, they may be rejected as surplusage. (*Croswell v. Weed*, 25 Wend. 621.)

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Assuming then that the count is good in substance, the next

inquiry is whether the first special plea to that count interposes a substantial defence and is well pleaded. For the plaintiff it is insisted that the charge of bad reputation can only be justified by facts showing such reputation deserved. Such a charge, it is said, implies in its popular acceptation that the party has done something to bring him into disrepute. The plea, it is alleged, is bad for being as general as the charge, and for the omission to state any facts which, if proved, would make good the charge. The plea sets up as a justification that the plaintiff had the reputation in Otsego County of a proud, captious, censorious, arbitrary, dogmatical, malicious, illiberal, revengeful and litigious man, and that therefore he was in bad repute. No facts or conduct of the plaintiff to show that such reputation was deserved are set forth in the plea. If the charge had been that the plaintiff had the reputation of having committed a particular crime, no one, I presume, would insist that a plea simply setting up the existence of such a reputation would be good. In such a case it would be indispensable to set forth the necessary facts showing the plaintiff to be guilty of the crime of which it was said he had acquired the reputation. By any other rule the reputation of any man, however pure, might be successfully assailed and effectually destroyed by a combination of malicious individuals. The general rule is thus perspicuously stated at length by Spencer, Ch. J., in *Van Ness v. Hamilton*, before referred to. "A plea in bar of the plaintiff's action must be certain to a common intent. It must be direct and positive in the facts set forth, and must state them with all necessary certainty. It is not correct to say that in a plea justifying a libel, because the subject comprehends multiplicity of matter, there may be general pleading to avoid prolixity." And again: "The rule to which I allude is laid down in the case of *J'Anson v. Stuart*, 1 T. R. 748. There the action was for a libel charging the plaintiff with being connected and concerned with a gang of swindlers and common informers. The plea stated that the plaintiff had been dishonestly concerned and connected with and was one of a gang of swindlers and common informers, and had also been guilty of defrauding divers persons with whom he had dealings and transactions. On demur-

rer to this plea, it was decided that it was bad on account of its generality; that it was contrary to every rule of pleading to charge the plaintiff with swindling without showing any instances of it: for wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them." In this case the charge is not of any act committed by the plaintiff, or the reputation of the commission of any particular act improper, immoral, criminal or otherwise; but only that in the estimation of the public in the county named, the plaintiff's reputation is bad; in other words, that his good name, credit or honor, as derived from public opinion, was to a greater or less extent forfeited or bad; that such was the public estimation at the time of the publication in question. This charge implies no particular act committed by the plaintiff. The defendants justify by averring the existence of the bad reputation, specifying in this plea the particular odious qualities which the plaintiff was reputed to possess, and averring that on that account he did not like to try his cause in the county. I think the plea is sufficient. I do not see in what other manner a justification could be interposed. In the nature of things, it would be impracticable for the defendants to spread upon paper the particular manifestations of pride, captiousness, malice, etc., which go to form such a character, and to prove that his public reputation was the consequence of such conduct. Reputation is the estimate in which an individual is held by public fame in the place where he is known. And the existence of a good or bad reputation is, I think, a fact which may be directly put to issue.

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PRIVILEGED COMMUNICATIONS: SOCIAL DUTY.

BYAM *v.* COLLINS *ET AL.*

(111 N. Y. 143. — 1888.)

A. J. Abbott for appellant.

James Wood for respondents.

EARL, J. The general rule is that in the case of a libellous publication the law implies malice and infers some damage. What are called privileged communications are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made *bona fide* upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged if made to a person having a corresponding *interest* or *duty*, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 Ellis & Black (Q. B.) 344, and has been generally approved by judges and text-writers since. In *Toogood v. Spyring*, 1 Cr. M. & R. (Ex.) 181, an earlier case, it was said that the law considered a libellous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned;" and that statement of the rule was approved by Folger, J., in *Klench v. Colby*, 46 N. Y. 427, and *Hamilton v. Eno*, 81 N. Y. 116. In *White v. Nicholls*, 3 How. (U. S.) 266, 291, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie*, relieves it from that just implication from which the general law is deduced."

Whether, within the rule as defined in these cases, a libellous communication is privileged is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury.

It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy

enough to apply the rule in cases where both parties, the one making and the other receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply on the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In *Whiteley v. Adams*, 15 C. B. N. S. 392, Erle, Ch. J., said: "Judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification;" and in the same case, Byles, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty; the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation by which private character may be overwhelmed and irreparable mischief done, and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty; not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. In *Coxhead v. Richards*, 2 Mann. G. & S. 569, 602, Coltman, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is

very hard on the other hand to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others; the propensity to tale-bearing and slander is so strong amongst mankind, and when suspicions are aroused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected;" and in the same case Cresswell, J., said: "If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to convey to the shipowner that which he *believed* to be true."

One may not go about in the community and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In *Godson v. Home*, 1 B. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication. In *Storey v. Challands*, 8 C. & P. 234, one Hersford was about to deal with the plaintiff when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with Storey you will live to repent it; he is a most unprincipled man," etc., and Lord Denman directed a verdict for the plaintiff because the defendant began by making the statement without waiting to be asked. In *York v. Johnson*, 116 Mass. 482, the defendant, a member of a church, was appointed with the plaintiff and other members of the church on a committee to prepare a Christmas festival

for the Sunday-school. He declined to serve, and being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman, and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet Devens, J., in the opinion said: "The ruling requested by the defendant that the communication made by him to Mrs. Newton was a privileged one and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York; but he was under no obligation to give any reason therefor, however persistently called upon to do so; and even if Mrs. Newton had an interest in knowing the character of Mrs. York, as a member of the same church, it was an interest of the same description which every member of a community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer and had been engaged in the practice of his profession at Caledonia for several months and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora, and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora, and they had been very intimate friends. Dora had a father and no

brother, and Mrs. Collins had a brother. During the time of this intimacy, and at some time before the marriage of Mrs. Collins, Dora repeatedly requested of her that if she "knew anything about any young man she went with, or in fact any young man in the place, to tell her because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him;" that she, Mrs. Collins, had a brother and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors and believed them, and, therefore, did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man, or about any young man in whom she had any interest; but it was for information about the young men generally with whom she associated. Nor literally construing the language, did Dora wish for information as to the gossip and rumors afloat about young men. What she asked for was such facts as Mrs. Collins *knew*, and not for her opinion about young men or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony; it was for information about all the young men in her circle. Mrs. Collins was not related to her and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young

ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information, did not make the defamatory communication privileged. (*York v. Johnson, supra.*)

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so if they did so find. On the contrary, it is clear that Dora would not, at the time, have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins' letter was prompted by her friendship for Dora and by the solicitation of "mutual friends to interfere in the matter and break off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself, as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in informing the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her," upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins in writing that letter act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did, if she acted as an ordinary prudent person would act under the same circum-

stances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins appears then as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, providing she acted in good faith and without malice. But a mere volunteer having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text-books and judicial opinions supporting the contention of the defendant that this letter was, in some sense, a privileged communication. But, after a very careful research, I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than that of any other, is that of *Todd v. Hawkins*, 8 Car. & P. 88. In that case, a widow, being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character, and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury was satisfied that, in writing it, he acted *bona fide*, although the imputations contained in the letter were false or based upon the most erroneous information; and if he used expressions, however harsh, hasty or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other, there would have been a

mere question of damage. A case nearer in point is that of *The "Count Joannes" v. Bennett*, 5 Allen, 169. There it was held that a letter to a woman containing libellous matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that, in writing the letter, the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not, in any way, interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before the same learned court decided the case of *Krebes v. Oliver*, 12 Gray, 239, wherein it was held that statements that a man had been imprisoned for larceny, made to the family of a woman he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship."

I am, therefore, of opinion that the letter was in no sense upon the facts as they appear in the record, a privileged communication.

There was, also, error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies, in part, to these slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "there is not that presumption of malice in the case of oral slanders that there is in

the case of deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged, the law implies malice.

The judge further charged the jury, in substance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications. There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins, as an emissary from or an agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her, and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her either to gratify his curiosity or to prevent the impending litigation between the parties. But even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged.

The trial judge, therefore, erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out, the judgment should be reversed and a new trial granted.¹

¹ The able dissenting opinion of Danforth, J., will repay perusal.

Some cases of absolute privilege have been given under "Exceptions to Liability," *supra*. See, also, *Wright v. Lothrop*, 149 Mass. 385, witness before

DEFAMATION: PRIVILEGE.

STUART v. BELL.

(1891.—2 Q. B. 341.)

LINDLEY, L. J. This is an action for slander. At the time when the slander was uttered the plaintiff was a valet in the employ of Mr. Stanley. Mr. Stanley was the guest of the defendant, who was the mayor of Newcastle. The plaintiff was staying with his master at the Mansion House at Newcastle. They had come from Edinburgh and were going on further visits. Whilst Stanley and the plaintiff were still at the Mansion House, at Newcastle, the chief constable of that town received from the chief constable of Edinburgh a letter to the effect that a lady who had been staying at the same hotel as

legislative committee. *Tuckerman v. Sonnerschein*, 62 Ill. 115, translating libellous words for an attorney. *Moore v. M. N. Bank*, 123 N. Y. 420, irrelevant allegations in legal papers, and dissenting opinion, p. 428.

Counsel's statements at trial are absolutely privileged in England (*Munster v. Lamb*, 11 Q. B. D. 588), but in America they must be pertinent (*Marsh v. Ellsworth*, 50 N. Y. 309; *Hoar v. Wood*, 3 Met. 193.)

Fair comment or criticism, distinguished from statements of fact. (*Davis v. Shepston*, 11 App. C. 187 (publication of a report containing false charges of specific acts); *Gott v. Pulsifer*, 122 Mass. 235 (Cardiff Giant case); *Silars v. Collier*, 151 Mass. 50 ("I am sorry that the representative from this district had a change of heart. Sometimes a change of heart comes from the pocket," — held not libellous). *Scandalum Magnatum* not known in United States; *Walker v. Hawley*, 56 Conn. 559; 16 At. 674.

Private duty. (*Fahr v. Hays*, 50 N. J. L. 275 (plaintiff referred to defendant for credit, and defendant called plaintiff "a thief," etc., in the presence of disinterested parties) — privileged. *Beals v. Thompson*, 149 Mass. 405 (letter from creditor to debtor's husband) — not privileged. *Lovell Co. v. Houghton Co.*, 116 N. Y. 520 (defendants charged plaintiffs with infringing copyright — privileged.)

The communications of mercantile agencies are privileged only when made upon special request. (*King v. Patterson*, 49 N. J. L. 417 (1887), and cases in prevailing and dissenting opinions; *Pollasky v. Minchener*, 46 N. W. 5 (1890, Mich.)) Not libellous for a mercantile agency to publish that a judgment for \$4000 has been rendered against one; but if false, and special damage is shown, an action will lie. (*Woodruff v. Bradstreet*, 116 N. Y. 217.)

the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The chief constable of Newcastle sent this letter to the defendant, who read it and returned it, and then told Stanley privately what I have above stated. This communication, which is the slander complained of, was made to Stanley just before he and the plaintiff left Newcastle; they were in fact just about to leave. Two or three days afterwards, Stanley told the plaintiff what had been communicated to him, and discharged the plaintiff on the ground that he could not keep in his employ a person on whom any suspicion of dishonesty had fallen. This discharge and the inability of the plaintiff to obtain a fresh situation, have occasioned loss to the plaintiff, and this loss is the special damage which he has sustained by reason of the slander complained of. The learned judge who tried the case told the jury that the communication made by the defendant to Stanley was not privileged, and the jury found a verdict for the plaintiff, damages £250. (After defining "privileged occasion," and quoting from authorities, the Lord Justice proceeds :) The question of privileged occasion turning then on the question of moral and social duty, and being a question of law for the judge and not a question for the jury, it is necessary to consider the grounds on which such duty can be maintained. The grounds in this case are the relation in which the defendant stood to Stanley and the relation in which the defendant stood to the public. This relation to Stanley was that of host to guest, and to some extent, of friend to friend. His relation to the public was that of mayor and magistrate in Newcastle, where Stanley was when the communication was made. The defendant knew that Stanley was about to be entertained by other people at other places, and that the plaintiff would accompany him. Under these circumstances, I am clearly of opinion that it was the defendant's moral and social though not legal duty to communicate to Stanley the information which the defendant had received. That information was no vague rumor or idle gossip, but came officially from the chief constable of Edinburgh to the chief constable of Newcastle, and was sent by him to the defendant, who was, as I have said, mayor of Newcastle and the host of Stanley. Suppose the suspicion

which had fallen on the defendant had been well founded and not ill founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified reticence? I answer no: he would not have been acting up to his duty either to the public or to Stanley. . . . The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff. My own opinion is clear and strong that it was his moral and social, although not legal, duty to do so; in other words, the occasion was privileged, and the judge should have directed the jury to that effect. It follows that there ought to be a new trial unless there was no evidence of malice on which a jury could properly find a verdict for the defendant.¹

¹ The question of malice is then considered, and the conclusion reached that there was no evidence of malice. The judgment below was set aside and judgment ordered for the defendant. LOPES, L. J., dissented, holding that the occasion was not privileged. His opinion is based largely upon the language of the letter from the chief constable of Edinburgh, who wrote that the groundwork of suspicion was very slender, and unless trace of the property to Stuart's possession was obtained no action could be taken against him, and asked that very careful and cautious inquiry be made so as not to injure Stuart, unless evidence of his guilt were obtained. "Without obtaining any evidence, without making any inquiry, in hot haste he makes a communication to the master impugning the honesty of his servant. I cannot think the defendant in so acting was discharging any duty social or moral. I think it was an officious and uncalled for act on his part, and therefore the occasion was not privileged." Pp. 355 6.

KIMBER v. PRESS ASSOCIATION.

(1893. — 1 Q. B. 65.)

LORD ESHER, M. R. I am of opinion that this appeal must be dismissed. The question is whether that which was done by the defendants was privileged by the law of England. The rule is that where there are judicial proceedings before a properly constituted judicial tribunal, which judicial tribunal is exercising its jurisdiction in open court, then a fair and accurate account published by any one of what then took place is privileged. Under certain circumstances such publication may be hard upon a person who is named in the report, but considerations of public policy require that such hardship should be endured rather than that judicial proceedings should be conducted in secret. If judicial proceedings were conducted in secret it might be productive of greater mischief than if the character of an individual should be for a time injured by an unfounded charge. The proposition of law is this, that if there is a judicial proceeding before a judicial tribunal, and in open court, a fair and accurate account of what then took place is privileged, if it is published without malice. That being so, we have to consider whether the present case is brought within that rule. This was a case in which a summons was asked for before magistrates against the plaintiff upon a charge of perjury. Now magistrates have jurisdiction to hear such an application; they are a legally constituted body, having jurisdiction to determine whether such a summons shall issue or not. The issue of such a summons is a judicial proceeding, and the consideration thereof is a judicial proceeding, and these are judicial proceedings taken before a judicial tribunal properly constituted for the purpose. This case is therefore so far within the rule. It is said however that although the magistrates were a judicially constituted body, and were exercising judicial functions, yet they were not doing so in open court. (After quoting from the statute and construing it.) Justices are by that section a legally constituted authority to exercise a judicial discretion in a judicial proceeding, and that must be done in open court

unless there is an enactment to the contrary. This proceeding was therefore taken in open court.

It was further argued that a report of the proceedings must not be published unless the magistrates have given a final determination. If there are judicial proceedings which, in the result, lead to final determination, although that stage is not arrived at, yet a fair and accurate account of the proceedings may be published before the final determination. That was really the decision of Lord Campbell in *Lewis v. Levy*, E. B. & E. 537; and I think that in *Usill v. Hales*, 3 C. P. Div. 319, the early part of the judgment of Lord Coleridge, C. J., seems to show that he would have held, if he had not considered himself overborne by authority, that the refusal of a summons upon an *ex parte* application was not a final determination in open court, a report of which would be privileged; he however thought that such a proposition was overruled by authority. It was because of that expression of opinion by Lord Coleridge that Lopes, J., I think, treated the subject rather tenderly, but came to the conclusion that a report might be published of preliminary proceedings if in the end they must result in a final determination. I think that the law must be so. The law then is, that where there are proceedings, which in the end result in a final determination, any one may publish a fair and accurate account of the preliminary proceedings. Then must an application for a summons, such as was made in this case, end in a final determination? If it is refused, that is a final determination. If the summons is issued, then the matter must proceed to a further inquiry, and then perhaps to trial, and at some stage of the proceedings there must be a final determination of some kind or other. That brings this case entirely within the rule, and a fair and accurate report of the proceedings upon an application for the issue of a summons, which is granted, may be published. Upon the next point, as to the *onus* of proof, for myself I am of opinion, that to claim privilege and to justify the publication during the course of a trial, the defendant must show that the report is a fair and accurate one, published without malice; that is to say, the burden of proof is on the defendant. A person on whom the burden of proof lies may however vouch the evidence adduced by the plaintiff, to supply that

proof, and not adduce any evidence himself. The question in this case then is whether the plaintiff himself did not do that which enables the defendant to say that what it was necessary for him to prove was proved in this case by the plaintiff, viz., that the report published in this case was a fair and accurate report. The plaintiff called a witness, who proved what took place. Every thing which is stated in the alleged libel did in fact take place, but it is said that there were omissions which made the report an unfair and inaccurate report. Two omissions were specified. There was nothing during the proceedings to show that the applicant was a peculiar person, and the judge at the trial was of opinion that the omission of the applicant's name was, under those circumstances, clearly immaterial, and that there was no question for the jury upon that. The other omission was that the report did not state the name of the person in whose bankruptcy the perjury was alleged to have been committed, and it was suggested that some persons might think that the plaintiff himself was the bankrupt. The judge thought that also quite immaterial, and I agree with him. The appellant's counsel has admitted that only an idiot could suppose anything of the kind. In this case therefore the plaintiff has saved the defendant from the necessity of proving that this was a fair and accurate report, for it was proved by the plaintiff's own witness that it was so. The judge at the trial was justified in holding that it was proved beyond the possibility of doubt that the report was fair and accurate, and that there was consequently no question for the jury.

This appeal fails, and must be dismissed.

POST PUBLISHING CO. v. HALLAM.

(59 Fed. Rep. 530. — 1893.)

ACTION by Hallam for libel. The article complained of contained the following language :

“The Berry-Hallam congressional fight in the sixth Kentucky district is still on, — that is to say, Banquo's ghost bobs

up now and then, to the annoyance of the congressional nominee, Berry, and the mortification of the defeated candidate, Theo. F. Hallam. The Boone County Recorder delivers a broadside at the Kenton county delegates, and naively asks: 'Why don't they come out and tell the truth about what induced them to go to Berry? The world knows.' Yes, the world knows, and you may say Mars and the planets know it also. Proprietor Roth, of the St. Nicholas Hotel, has an inside cinch on this inside information. Everyone knows Colonel Berry. He is a monopolist, corporation controller, millionaire speculator, political wire-puller, first-class hustler, and a pretty good sort of a fellow. Hallam is a successful lawyer at Covington; but legal eminence does not mean the fat incomes that are its synonyms on this side of the Ohio. Hallam is one of the bhoys, loves ward politics for the fun, if not the emoluments, and is about as poor as a church mouse. In fact, he owes several hundred dollars for taxes. The two counties, Kenton and Campbell, threw out their hooks for the congressional nomination. Kenton swore by Hallam, while Campbell vowed that the political friend and chum of Carlisle, Cassius M. Clay, Jr., and Charles J. Helm, their own millionaire and boss, Albert S. Berry, should be the nominee. The fight waxed hot. The convention was held at Warsaw, commencing on September 27th, and ending September 30th. The Kenton boys prepared for the fray. The principal preparation consisted in engaging the steamer Henrietta to carry the delegates to Warsaw, and the carte blanche orders of Mr. Roth, of the St. Nicholas hostelry, to fill her up from truck to keelson with the best the cellar and the larder of the house afforded. As one delegate remarked: 'Why, the champagne flowed off the decks so much that even the Henrietta was swimming in it.' Hallam and his crowd did all the feasting and the drinking. The Campbell county men were not in it. But the bill was made out to Colonel A. S. Berry. Here is the bill: 'St. Nicholas. Edward N. Roth. Cincinnati, October 10, 1892. Colonel A. S. Berry, per Theodore F. Hallam, to the St. Nicholas Hotel Company, Dr.: For meals, service, wine, and cigars served on board the steamer Henrietta, \$865.15.' Then again: 'At Warsaw the battle raged four days. On the last day Colonel Berry and Lawyer Hallam were seen to go arm in arm to the

rear of the courthouse, where the convention was held. They had a quiet and confidential chat. At its conclusion Hallam called his warriors about him, and spoke to them in whispers. Immediately thereafter the whole Kenton county delegation cast its vote for Colonel Berry, and he received the nomination. Is Colonel Berry carrying out all and every one of the promises he made? Ah, there's the rub. Mr. Roth, of the St. Nicholas, has sent a bill of \$865.15 to Colonel A. S. Berry. That bill is for "dry" and "wet" provisions ordered by Hallam, and disposed of by Hallam's supporters. Such generosity on the part of the victor to the vanquished is truly touching.' "

TAFT, Circuit Judge, (after disposing of several assignments of error.)

Finally we come to those assignments of error which are based on the charge of the court in regard to privileged communications. The court in effect told the jury that the article in question, relating as it did to a matter of public interest, came within a class of communications that was conditionally privileged; that the public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism, not only by the press, but also by all members of the public, for the press had no higher rights than the individual; but that while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact, as for instance that the candidate had committed disgraceful acts, were not privileged, and if the charges were false, good faith and probable cause were no defence, though they might mitigate damages. Counsel for the plaintiff in error and the defendant below has argued with great vigor and an array of authorities that we ought not to adopt the view of the Circuit Court upon this important question, but should hold that the privilege extends to statements of fact as well as comment.

The argument is this: Privileged communications comprehend all *bona fide* statements in performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. (Townsh. Sland. & L. § 209.) It is of

the deepest interest to the public that they should know facts showing that a candidate for office is unfit to be chosen. Therefore, every one who has reasonable ground for believing, and does believe, that such a candidate has committed disgraceful acts affecting his fitness for the office he seeks, should have the right to give the public the benefit of his information, without making himself liable in damages for untrue statements, unless malice is shown. Though of imperfect obligation, it is said to be the highest duty of the daily newspaper to keep the public informed of facts concerning those who are seeking their suffrages and confidence. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for service with them? Is it not, at least, as important that the high functions of public office should be well discharged, as that those in private service should be faithful and honest?

The *a fortiori* step in this reasoning is only apparent. It is not real. The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a *bona fide* statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if

only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and of course it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted; and yet the rule complained of is the law in many of the States of the Union and in England.

In *Davis v. Shepstone*, 11 App. Cas. 187, Lord Chancellor Herschell delivered the judgment of the judicial committee of the privy council in an appeal from a judgment for libel recovered in the Supreme Court of Natal. The plaintiff below was a resident commissioner of Great Britain in Zululand, and the alleged libel charged him with having committed unprovoked and altogether indefensible assaults upon certain Zulu chiefs. The publication was made in the colony of Natal, where the conduct of the resident commissioner in Zululand was of great public interest. It was claimed that the article was conditionally privileged, and that the plaintiff ought to have succeeded only on proof of express malice. This claim was denied. The lord chancellor thus stated the law :

“There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgrace

ful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears, without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."

Other English cases laying down the same doctrine are *Campbell v. Spottiswoode*, 3 Fost. & F. 421, 432, affirmed 3 Best & S. 769, and *Popham v. Pickburn*, 7 Hurl. & N. 891, 898. The latest American case, and the most satisfactory, is that of *Burt v. Newspaper Co.*, 154 Mass. 238, 242, where Justice Holmes discusses the question, and quotes with approval the foregoing passage from the judgment in *Davis v. Shepstone*. . . .

Judgment of the Circuit Court affirmed with costs.

HEBDITCH v. MACILWAINE.

(1894.—2 Q. B. 54.)

LORD ESHER, M. R. In this case the plaintiff has brought an action against the defendants for writing and publishing a libel upon him, the defamatory matter complained of being that he had, when a candidate for the office of guardian for the poor been guilty of treating. It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel. It was proved that the defendants had written and published to the board of guardians matter

which the jury found to be libellous with regard to the plaintiff and which was untrue. The defendants set up by way of defence that the occasion was privileged. It is for the defendant to prove that the occasion is privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff, but unless the defendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, and not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but where the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion. . . . It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest and were asking them for redress in the matter, which they believed they could give. [The defendants were rate payers and had a right to vote at the election.—Ed.] Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this; that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to show that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged. Reliance was placed rather on authority than on principle in support of the contention for the defendants. . . . The only case which really seems to me to be a strong authority in favor of the defendants' contention is the case of *Tompson v. Dashwood*, (11 Q. B. D. 43.) There the judges distinguish between the writing and the publication of the libel, and speak of the writing as having been on a privileged occa-

sion. I cannot follow their reasoning. The cause of action in libel is, as I said at the beginning of my judgment, not the writing but the publication of the libel; and the question is not whether the writing, but whether the publication is on a privileged occasion. The only way to deal with that case, in my opinion, is to say that we do not agree with it, and that it is wrongly decided. Therefor in the present case, when it was proved to the judge that the libel was published by the defendants to the board of guardians, who had no interest in the matter nor any duty or power to deal with it, then without more he ought to have held that the occasion was not privileged, and there was no further question to try as to privilege.¹

¹ Concurring opinions were delivered by Smith and Davey, LL. J., the latter of whom said "the judgment in *Tompson v. Dashwood* cannot be supported." *Morey v. Morning Journal Association*, 123 N. Y. 207; *Griebel v. Rochester Co.*, 60 Hun. 319, *accord*; *Hanson v. Globe Co.*, 159 Mass. 293, *contra*; but see dissenting opinion by Holmes, J., in which Morton and Barker, concurred.

CHAPTER VIII.

DECEIT: FALSEHOOD IN FACT.

STEWART *v.* STEARNS.¹

(63 N. H. 99. — 1894.)

Ray & Walker and *W. L. Foster* for the plaintiff.*J. Y. Mugridge* and *Chase & Streeter* for the defendant.

CLARK, J. The finding of the referee is authorized by the facts appearing in the case. If the defendant made false and

¹In *Deming v. Darling*, 148 Mass. 504, among the representations relied on, one was that the railroad mortgaged, which was situated in Ohio, was good security for the bonds; and another was that the bond sold by defendant to plaintiff was of the very best and safest, and was an A No. 1 bond. At p. 505, Holmes, J., says, "The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries, (*Pike v. Fay*, 101 Mass. 134.) But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, (*Teague v. Irwin*, 127 Mass. 217,) and as to which it always has been understood the world over, that such statements are to be distrusted. (Citing cases.) The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed."

In *Rothschild v. Mack*, 115 N. Y. 1, the false statement by the vendor of a note, that it was as good as the Bank of England, was held "an actionable, fraudulent representation."

fraudulent representations upon material matters, calculated and intended to mislead and prevent examination and inquiry as to the character and quality of the stock of goods, to induce the plaintiff to make the trade, and the plaintiff, in the exercise of ordinary prudence, relying upon such representations as true, was induced to enter into the contract and was thereby defrauded, he is entitled to damages.

Upon competent evidence the referee has found that the defendant, knowing that the plaintiff was unacquainted with such goods as made up the stock in his store, both before the making of the written agreement and during the taking of the inventory, represented and stated to the plaintiff, in substance, that his stock was clean and desirable, and that the goods were of good styles and salable; that the plaintiff, relying upon the defendant's representations, did not make a careful examination of the goods, and did not avail himself of the means provided in the written agreement for fixing the prices of the goods; that the stock contained remnants of carpets, and both carpets and papers of old patterns and styles, which were not salable at the prices put upon them in the inventory, and nothing was said by the defendant to the plaintiff about this; and that the plaintiff relied upon the representations made by the defendant, and was deceived by them and by the suppression of facts relating to the stock. It is also to be assumed, from the finding of the referee for the plaintiff, that the defendant knew the representations were false, that they were made as statements of material facts to deceive the plaintiff and were not mere expressions of opinion, and that the plaintiff was justified in relying upon them. These questions of fact are included in the general finding. (*Noyes v. Patrick*, 58 N. H. 618.) If the representations were false, the defendant knew them to be so, and the conclusion is almost irresistible that they were made with intent to deceive and defraud. (Benj. Sales, sec. 460.)

It is objected that the plaintiff was not justified in relying upon the representations of the defendant, and that the referee erred in holding that the rule *caveat emptor* did not apply to this case. If the rule was of universal application, an action of deceit for false representations in a sale could never be maintained by the purchaser. It may be difficult to draw the line

which separates cases within the rule from those to which it does not apply, as each case depends to some extent upon its peculiar circumstances; but it applies generally to cases free from actual fraud, where the parties deal upon an equal footing and with equal means of knowledge; and it is not applicable, as a general rule, where false and fraudulent representations of material facts are made by the vendor, and the parties have not equal facilities for ascertaining the truth. In such cases the purchaser has the right to rely upon the statements of the vendor; and when the purchaser is justified in relying upon the representations of the vendor, the rule *caveat emptor* does not apply.

Where the statements are of material facts, essentially connected with the substance of the transaction, and not mere general commendations or expressions of opinion, and are concerning matters which from their nature or situation are peculiarly within the knowledge of the vendor, the purchaser is justified in relying on them; and in the absence of any knowledge of his own, or of any facts which should excite suspicion, he is not bound to make inquiries and examine for himself. Under such circumstances it does not lie in the mouth of the vendor to complain that the vendee took him at his word. On the other hand, where the representations consist of general commendations or mere expressions of opinion, or where they relate to matters not peculiarly within the knowledge of the vendor, the purchaser is not justified in relying upon them, but is bound to examine for himself so as to ascertain the truth. (2 Pom. Eq. Juris, secs. 891, 892.) In this case the parties were not on an equal footing, and had not equal means of knowledge. The defendant had an experience of fifteen years in trade, and knew the exact condition of his stock. The plaintiff had no acquaintance with such goods, and could learn nothing of their style and quality from an examination. The defects in the goods were to him undiscoverable defects. The representations made by the defendant related to material matters of fact, and the plaintiff was justified in relying on them. He was not guilty of negligence in assuming them to be true, nor was it his duty to employ a competent person to examine the goods.

In *Poland v. Brownell*, 131 Mass. 138, cited by the defend-

ant in argument as a case strongly resembling the case at bar, it is stated in the opinion of the court "that the evidence showed that the plaintiff relied on his own examination and the advice of a friend, and for all that appeared both buyer and seller had equal means of information, and were equally well qualified to judge of the value of the property."

* * * * *

*Judgment for the plaintiff on the report.*¹

MISREPRESENTATION OF LAW.

WESTERVELT v. DEMAREST.

(46 N. J. L. 37. — 1884.)

For the plaintiff, *Bedle, Muirheid & McGee*.

For the defendants, *Charles H. Voorhis* and *W. M. Johnson*.

VAN SYCKEL, J. . . . It is clear that no contract was entered into between these parties, and that no recovery can be had on the ground of a contract liability. But the statement that directors and stockholders were responsible for all debts and engagements of the bank was false, to the knowledge of defendants, and therefore fraudulent. It appearing as one of the findings of fact in the case that the plaintiff made his deposits relying on the truth of this statement, he would be entitled to recover the loss he sustained by acting upon it, in an action for deceit. It also appears from the pass-book that entries to the credit of plaintiff were made in it by the bank

¹ (Cf. *Holbrook v. Connor*, 60 Me. 578; 11 Am. R. 212.) In *Bishop v. Small*, 63 Me. 12, the court held that representations as to what a patent right cost the vendor, or was sold for by him, or as to profits that could be derived from it, were statements of opinions. (Contra *Van Epps v. Harrison*, 5 Hill 63.)

Purchaser is entitled to rely on representation that vendor's price is the same as that of A and B in the same business. (*Conlan v. Roemer*, 52 N. J. L. 53.) So vendor may rely on purchaser's assertion that he has bought a neighbor's hops at a certain price. (*Smith v. Countryman*, 30 N. Y. 655.)

officers on the 1st day of May and 1st day of November, in each year, from 1873 to 1879 inclusive. The return of this pass-book to the plaintiff on each of these occasions, with the aforesaid printed statement upon it, was a reiteration of the false representation, and it is manifest that thereby the plaintiff was induced to permit his deposits to remain and accumulate in the bank.

This deceit having been practised by the defendants within six years, they could not avail themselves of the statute of limitations as a defence. Although recovery in this case cannot be maintained upon the basis of a contract, it is obvious that the granting of a new trial would be of no avail to the defendants, for the pleadings would be amended by the trial court, and upon the incontrovertible facts a verdict must necessarily pass in favor of the plaintiff for the loss the false representation has occasioned.

That loss was the sum deposited, with interest, being the same amount for which the verdict has been found in this case. The plaintiff being clearly entitled to recover the sum found, the necessary amendment may be made.

The rule to show cause should be discharged.¹

RECKLESS IGNORANCE.

CHATHAM FURNACE Co. v. MOFFATT.

(147 Mass. 403. — 1888.)

TORT for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to take a lease of a mine, and to purchase certain mining machinery.

Trial in the Superior Court, without a jury, before Barker, J., who refused to give certain rulings requested by the defendant, and found for the plaintiff. The defendant alleged exceptions, the substance of which appears in the opinion.

¹ Cf. *Fish v. Cleland*, 33 Ill. 238; *Cook v. Nathan*, 16 Barb. 342; *Davis v. Betz*, 66 Ala. 206; *Hirshfield v. London Ry. Co.*, 2 Q. B. D. 1.

M. Wilcox and *E. M. Wood* for the defendant.

H. L. Dawes and *T. P. Pingree* for the plaintiff.

C. ALLEN, J. It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles. (*Cole v. Cassidy*, 138 Mass. 437; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Milliken v. Thorndike*, 103 Mass. 382; *Fisher v. Mellen*, 103 Mass. 503; *Stone v. Denny*, 4 Met. 151; *Page v. Bent*, 2 Met. 371; *Hazard v. Irwin*, 18 Pick. 95.) And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, among others: *Cooper v. Schlesinger*, 111 U. S. 148; *Bower v. Fenn*, 90 Penn. St. 359; *Brownlie v. Campbell*, 5 App. Cas. 925, 953, by Lord Blackburn; *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64, 79, 80, by Lord Cairns; *Slim v. Croucher*, 1 DeG. F. & J. 518, by Lord Campbell. See, also, *Peek v. Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and debris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron

ore, from 8000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out, and visible when the bed was free from water and debris. The material point was, whether this mass of iron ore, which did in truth exist under ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy these representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of the survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly veri-

fied, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of *Milliken v. Thorndike*, 103 Mass. 382, bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff (the lessor) had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."¹

Exceptions overruled.

DUTY TO GIVE INFORMATION.

ANONYMOUS.

(67 N. Y. 598. — 1876.)

Samuel Hand for the appellants.

Henry H. Morange for the respondents.

THIS was an appeal from an order of the General Term affirming an order of Special Term, which denied a motion on the part of defendants to vacate an order of arrest.

¹ Cf. *Oberlander v. Speiss*, 45 N. Y. 175; *Derry v. Peek*, 14 Appeal Cas. 337; *Angus v. Clifford*, (1891) 2 Ch. 449, but see *Goodwin v. Mass. Loan Co.*, 152 Mass. 202.

The order of arrest was based upon the provision of the Code (sec. 179, sub. 4), authorizing an arrest "when defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action was brought." The affidavits upon which the order of arrest was granted, showed substantially that defendants had for a number of years been doing an extensive business as bankers, living in great style, having a large banking-house and many employees, and that they were reputed to be very wealthy. Plaintiffs had been doing business with them for several years, believing them to be perfectly responsible. Plaintiffs purchased of them a sight draft on a London bank; at the time defendants were hopelessly insolvent, their assets being only sufficient to pay about forty per cent of their indebtedness. This condition of affairs was known to them. Seven days after the draft was purchased defendants closed their doors and made an assignment. The draft was presented and payment refused. Defendants did not show what capital, if any, they had in their business, or by what disaster they became so largely insolvent, nor what reasons, if any, they had to hope they could continue on in their business. *Held*, that the order of arrest was properly granted.

Defendants' affidavit showed that when the draft was sold they had a large amount of money on deposit in the London bank. Before, however, the draft reached London, this deposit had been exhausted by prior drafts and letters of credit, and defendants had become largely indebted to the drawer. *Held*, that the fact of the deposit did not relieve defendants, and was of no importance. The court say:

"This is not like the case of a trader who has become embarrassed and insolvent and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. (*Nichols v. Pinner*, 18 N. Y. 295; *Brown v. Montgomery*, 20 id. 287; *Johnson v. Morrell*, 2 Keyes, 655; *Chafee v. Fort*, 2 Lans. 81.) But it is believed that no case can be found in the books holding that a trader who was hopelessly insolvent, knew that he could not pay his debts and that he must fail in business,

and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity and thus obtain property which he had every reason to believe he could never pay for. In such a case he does an act the necessary result of which will be to cheat and defraud another and the intention to cheat will be inferred.”¹

INTENTION OF THE STATEMENT.

BOYD'S EXRS. v. BROWNE.

(6 Barr, 310.—1847.)

THIS was an action on the case *sur deceit*, brought by William H. Brown & Co., against William R. Smith and Alexander Jordan, executors of John A. Boyd, deceased, to recover damages for false and fraudulent representations made by the defendant's testator, as to the credit of a third person.

It was alleged in substance, in the declaration, that John A. Boyd falsely and fraudulently recommended one John B. Miller as a person worthy of being trusted for merchandise, and thereby induced the plaintiffs to sell him goods on credit to the amount of \$389; that, at the time of such representations, the said Miller was not worthy of credit; that Boyd knew his representations to be false, and that Miller was at that time greatly indebted to him and various other persons, and in bad circumstances; that no part of the goods sold by plaintiffs had been paid for, and that the said John B. Miller was, and still is, wholly unable to pay for the same.

Greenough for the plaintiff in error.

Hegins & Bellas contra.

¹ (*Hotchkin v. Third N. Bk. of M.*, 27 N. E. 1050 (127 N. Y. 329).) Suppression, with intent to deceive, of a material fact which one is in good faith bound to disclose is equivalent to a false representation. (*Stewart v. Wyoming Ranch & Co.*, 128 U. S. 383.)

As to deceit in renting a house, see *Franklin v. Brown*, 118 N. Y. 110.

BELL, J. We see nothing exceptionable in the charge of the court. The principles upon which this peculiar action is based were correctly stated, and the facts fairly put before the jury. The ground of action is the deceit practised upon the injured party; and this may be either by the positive statement of a falsehood, or the suppression of material facts, which the inquiring party is entitled to know. The question always is, did the defendant knowingly falsify, or wilfully suppress the truth, with a view of giving a third party a credit to which he was not entitled. It is not necessary there should be collusion between the party falsely recommending and he who is recommended; nor is it essential, in support of the action, that either of them intended to cheat and defraud the trusting party at the time. It is enough, if such has been the effect of the falsehood relied on. Misrepresentations of this character are frequently made from inconsiderate good nature, prompting a desire to benefit a third person, and without a view of advancing a party's own interests. But the motives by which he was actuated do not enter into the inquiry. If he make representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit. These doctrines are fully established by the cases of *Haly v. Free*, 3 Term Rep. 51; *Foster v. Charles*, 6 Bing. 369; *S. C.* 7 Bing. 105; *Corbit v. Brown*, 8 Bing. 33; *Allen v. Addington*, 7 Wend. 9. In *Foster v. Charles*, when it was first in Westminster Hall, Tindal, Ch. J., said: "It has been argued that it is not sufficient to show that a representation on which a plaintiff has acted was false within the knowledge of the defendant, and that damage has ensued to the plaintiff; but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position; nor can it be material what the motive was. The law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." All the other judges fully concurred in the soundness of those views, and indeed they recommend themselves by their intrinsic merit. But that part of the instruction chiefly complained of here is the direction to the jury, that the suppression of the fact by Boyd, that he had taken securities for

large amounts from Miller in payment of the merchandise sold by Boyd to him, was evidence of fraud and deceit. The soundness of this opinion is fully shown by the authorities, and particularly by *Corbit v. Brown*, 8 Bing. 33; *Allen v. Addington*, 7 Wend. 9, and *Ward v. Centre*, 3 Johns. Rep. 271. It is scarcely necessary to add that in the case at bar there was abundant evidence, if believed, to establish the fact that Boyd took more than ordinary pains to inculcate a falsehood, which he must have known was untrue, for the purpose of inducing plaintiffs to credit Miller.

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Judgment affirmed.

STATEMENTS TO A CLASS OF PERSONS.

EATON, COLE & B. CO. v. AVERY.

(83 N. Y. 31. — 1880.)

John H. Bergen for appellant.

John L. Hill for respondent.

RAPALLO, J. This is an action for deceit in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before

whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. (*Cazeaux v. Mali*, 25 Barb. 578; *Newbery v. Garland*, 31 id. 121; *Broff v. Mali*, 36 N. Y. 200; *Morgan v. Skiddy*, 62 id. 319; *Commonwealth v. Call*, 21 Pick. 515, 523; *Commonwealth v. Harley*, 7 Metc. 462.) The principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers of the agency, when applied to by a customer to sell goods to him on credit, may, by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a

wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A casually or from vanity makes a false or exaggerated statement of his pecuniary means to B, or even if he does so with intent to deceive and defraud B, and B communicates the statement to C, who acts upon it, A cannot be held as for a false representation to C. But if A makes the statement to B for the purpose of being communicated to C, or intending that it shall reach and influence him, he can be so held. In *Commonwealth v. Call*, 21 Pick. 515, the court say on this point, at page 523, that the representation was intended to reach P and operate upon his mind; that it did reach him, and produced the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In *Commonwealth v. Harley*, 7 Metc. 462, the prisoner was indicted for obtaining goods by false pretences from G. B. & Co. The representations were made by one Cameron, in the absence of the prisoner Harley, to a clerk of G. B. & Co., who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A make a false statement of his affairs to B and then publicly hold out B as his reference, can it be doubted that he would be bound by the communication of his statement by B to any person who might inquire of him in consequence of this reference? That case differs from the present one only

in the fact that here there was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the defendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information, or whether he gave it on application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm. The case is a new one in its facts, but the principles by which it should be governed are well established.

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Judgment affirmed.

MEANS OF KNOWLEDGE IMMATERIAL.

DAVID v. PARK.

(103 Mass. 501. — 1870.)

T. L. Livermore for the plaintiffs.

J. H. Butler for the defendant.

GRAY, J. Neither of the grounds assigned by the learned judge who presided at the trial, for the ruling, under which a verdict was returned for the defendant in each of these cases, is tenable.

1. The evidence introduced tended to show that the defendant falsely and fraudulently stated, as of his own knowledge and not as a matter of opinion, in the one case, that he had the interest in the patent right which he undertook to sell, and in the other, that the invention was not covered by any other patent. A distinct statement of such a fact by a seller, knowing it to be false, and with the intent to deceive

the buyer, and on which the buyer acts to his own injury, will sustain an action of deceit, even if the buyer might have discovered the fraud by searching the records of the patent office. (*Brown v. Castles*, 11 Cush. 348; *Manning v. Albee*, 11 Allen, 520; *S. C.* 14 Allen, 7; *Watson v. Atwood*, 25 Conn. 313.)

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*Exceptions sustained.*¹

FRAUD BY AGENT.

KENNEDY v. McKAY.

(43 N. J. L. 288. — 1881.)

ON rule to show cause why a new trial should not be granted.

For the rule, *G. Collins*.

Contra, *Scudder & Vredenburg*.

BEASLEY, Ch. J.

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But even if we were to assume that this stock was in reality the property of McKay, and that Halliard and Reid were his agents to make sale of it, still it is not apparent upon what legal theory this present action could be sustained. To support this suit against McKay fraud must be imputable to him, and the case is entirely destitute of all testimony tending to show that he authorized, or was privy to the utterance of the false representations in question. On the ground thus assumed, then, the case would be that of a sale made by fraud-doing agents in behalf of an innocent vendor. Whatever uncertainty may at one time have prevailed in regard to the legal incidents of such a position, such uncertainty no longer exists, and the rights under the given circumstances of both vendor and vendee have been plainly defined, and, as I

¹ *Albany Savings Bank v. Burdick*, 87 N. Y. 40; *Schwenk v. Naylor*, 102 N. Y. 683; *Thorne v. Prentiss*, 83 Ill. 99.

think, firmly settled by recent judicial decisions. In the light of such authorities it is clear that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a juncture the aggrieved vendee has at law two, and only two remedies; the first being a rescission of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent, founded on the deceit. But in such a posture of affairs a suit based on the fraud will not lie against the innocent vendor, on account of the deceit practised without his authority or knowledge by his agent. If the situation is such that the vendee can make a complete restitution, so as to put the vendor in the condition with respect to the property sold that he was in at the time of the sale, he has the right to rescind such contract of sale, and if the vendor, on a tender to that effect, refuses to return the money received in the transaction, a suit will lie for such money, but such refusal on the part of the vendor will not make him a party to the original wrong; so that he can be sued for the deceit. This is the doctrine declared with much clearness and force by Barons Bramwell and Martin in the case of *Udell v. Atherton*, 7 H. & N. 172, and their views on this subject were concurred in, and the principle propounded by them adopted and enforced by the House of Lords in *Western Bank of Scotland v. Addie*, L. R. I. Sc. App. 146. In this latter case the action was against the bank for deceit, which was alleged to consist in certain fraudulent representations, charged to have been made on a sale of stock to the plaintiff by the directors of such corporation as its agents. Lord Chelmsford, in giving his views, said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and suit is brought in the name of the company to seek to enforce this contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because the company cannot retain any benefit which they

have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for the deceit, such an action cannot be sustained against the company, but only against the directors personally." Lord Cranworth, in his opinion, puts himself on the same ground, and says: "A person defrauded by the directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." It is obvious that the doctrine embodied in this decision, which is of so great weight as to be almost entitled to stand as authoritative in this court, if applied to the present case, will have the effect of taking from the plaintiff's suit, so far as it relates to Mr. McKay, every semblance of a foundation. By bringing his action in its present form the plaintiff has given up all idea of a rescission of the contract of sale, and the consequence is that, according to the doctrine of the cases cited, he must connect his last-named defendant with the fraud by which the sale was effected, if he would obtain a judgment against him. But in this he has altogether failed.¹

This rule should be made absolute.

ERIE CITY IRON WORKS v. BARBER.

(106 Pa. St. 125. — 1884.)

ACTION of deceit by Barber & Co. against the Iron Works to recover damages sustained by the partial destruction of plaintiffs' mill by the explosion of a boiler which plaintiffs alleged had been deceitfully represented to them by defendant as safe and fit for use. The alleged deceit was practised if at all by defendant's agent Selden.

¹ Cf. *Jeffrey v. Bigelow*, 13 Wend. 518; *White v. Sawyer*, 16 Gray, 586.

Cause of action for deceit against one partner is not merged in judgment on contract against the firm. (*N. Y. L. I. Co. v. Chapman*, 118 N. Y. 288.)

TRUNKEY, J. (After disposing of various assignments of error.) A corporation engaged in the manufacture of machinery ought to be responsible to purchasers the same as natural persons under similar circumstances. As it can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent done within the ostensible scope of his authority and while transacting the business of the principal, than where the principal is a natural person. However, the same rule applies alike to natural and artificial persons. The "purchaser can maintain an action of deceit against the innocent principal, when the fraud of the agent has been committed within the scope of his authority and when the principal has benefited by it. In this respect it makes no difference whether the principal be a corporation or an individual." (*Benjamin v. Sales*, vol. 2, § 708, 3 Eng., 4th Am. ed.) "The principal is liable in a civil suit to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and misfeasances of his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. This rule of liability is not based upon any presumed authority in the agent to do the acts, but on the ground of public policy, and that it is more reasonable when one of two innocent persons must suffer from the wrongful acts of a third person that the principal who has placed the agent in the position of trust and confidence should suffer, than a stranger." (*Lee v. Sandy Hill*, 40 N. Y. 442.) If a corporation be incapable of committing deceit, the safety of third persons with whom it deals by agent, requires that it be held liable in the proper action for the deceit of its agent perpetrated in such dealing. The learned judge of the Common Pleas did not err in submitting the case as if the deceit of the defendant's president and general manager was the deceit of the defendant.¹ . . .

¹ (*Haskell v. Starbird*, 152 Mass. 117; *Busch v. Wilcox*, 82 Mich. 336, accord.) In *Wheeler v. Baars*, 15 So. 584, at p. 589, 33 Fla. 696, the court said: "The proposition contained in the first charge of the court, to the effect that 'a principal is not liable civilly for the frauds and deceits of his agent committed in the course of his employment,' was clearly erroneous. It is

SECTION 2. SLANDER OF TITLE.**DOOLING BUDGET PUB. CO.**

(144 Mass. 258. — 1887.)

TORT, for an alleged libel, contained in the following words: "Probably never in the history of the Ancient and Honorable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would suppose, from the elab-

well settled that for deceit and false representations made by an agent in the course of his employment both the agent and his principal are civilly liable; and, so far as the liability of the principal is concerned, it makes no difference whether he authorized or was cognizant of the misrepresentation and deceit of his agent or not. (1 Lawson, Rights, Rem. & Pr. §§ 112, 114, and authorities cited.)"

Rhoda v. Annis (75 Me. 17; 46 Am. R. 354) was an action to recover damages for deceit in the sale of a farm, the fraudulent representations having been made by defendant's son acting as her agent. Danforth, J., delivering the unanimous opinion of the court, said: "But it is denied that the defendant is liable in this form of action. It is said that being personally innocent of fraud, she cannot be convicted of that which has been committed by another with no authority from her, except that which results from his agency. This may be true in a criminal prosecution, but not in a civil action. If she is liable, that liability must be ascertained in the proper form of action. Here is no contract of any kind, express or implied, between the parties which can afford any remedy for the injury of which the plaintiff complains. He claims that a wrong, for which the defendant is responsible, has been done him. For that wrong he seeks a remedy. What remedy can he have except an action of tort? The counsel says two. He may rescind the contract, and recover back the consideration paid, or, in an action for money had and received, recover the profits accruing from the fraud. But neither of these may be adequate to his injury. (*Strang v. Bradner*, 114 U. S. 551; *City Bank v. Dun*, 51 Fed. 160; 58 Fed. 174, accord.)

orate bill of fare, that a sumptuous dinner would be furnished by the caterer Dooling; but instead, a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better."

At the trial in the Superior Court, before Pitman, J., the publication of the words by the defendant was admitted.

The plaintiff's counsel, in opening the case to the jury, stated that the plaintiff was a caterer in the city of Boston, with a very large business, and acted as caterer upon the occasion referred to. Upon the statement of the plaintiff's counsel that he should offer no evidence of special damage, the judge ruled, without reference to any question of privilege that might be involved in the case, that the words set forth were not actionable *per se*, and that the plaintiff could not maintain his action without proof of special damage; and, the plaintiff's counsel still stating that he should offer no evidence of special damage, directed a verdict for the defendant, and reported the case for the determination of this court.

If the ruling was correct, judgment was to be entered on the verdict; otherwise, the case to stand for a new trial.

C. B. Southard and R. Bradford for the plaintiff.

W. E. L. Dillaway and H. E. Bolles for the defendant.

C. ALLEN, J. The question is, whether the language used imports any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he provided. Words relating merely to the quality of articles made, produced, furnished or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings and other works of art, music, architecture, and generally of the product of one's labor, skill or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further, and attacks the individual. (*Gott v. Pulsifer*, 122 Mass. 235; *Swan v. Tappan*, 5 Cush. 104; *Tobias v. Harland*, 4 Wend. 537;

Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R. 9 Ex. 218; *Young v. Macrae*, 3 B. & S. 264; *Ingram v. Lawson*, 6 Bing. N. C. 212.) Disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libellous, as in *Bignell v. Buzzard*, 3 H. & N. 217.

The old case of *Fen v. Dixe*, W. Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in terms of disparagement at least as strong as those used by the present defendant in respect to the plaintiff's dinner, wines and cigars; but the action failed for want of proof of special damage.

In *Evans v. Harlow*, 5 Q. B. 624, 631, Lord Denman, Ch. J., said: "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be 'false, scandalous, malicious and defamatory,' that the plaintiff can found a charge of libel upon them."

In the present case there was no libel on the plaintiff, in the way of his business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners which the plaintiff knew to be bad, is charged, nor even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion provided a very poor dinner, vile cigars and bad wines. Such a charge is not actionable, without special damage.¹

Judgment on the verdict.

¹ (*Wilson v. Dubois*, 35 Minn. 471; 29 N. W. 68 (1886).) Slander of title extends to trade-marks. (*McElwee v. Blackwell*, 94 N. C. 261.)

Action for slander of title to land in Georgia may be brought in New York. (*Dodge v. Colby*, 108 N. Y. 445.)

HATCHARD *v.* MÈGE.

(18 Q. B. D. 771. — 1887.)

DAY, J. This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleged that the defendants wrote and published “of and concerning the plaintiff and his said trade as a wine-merchant and importer the following false and malicious libel, that is to say:—

“ ‘Caution: Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised,’ thereby meaning that the plaintiff had no right to use his said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavoring to pass off an inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word ‘Delmonico’ as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom.”

The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff’s counsel and what appears on the

pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in Odgers on Libel and Slander, c. v., p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods, or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria*. The *injuria*

consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff.

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shown injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim.

Order for a new trial.

SECTION 3. MALICIOUS PROSECUTION.

STEWART v. SONNEBORN.

(38 U. S. 187. — 1878.)

Mr. Roscoe Conkling for the plaintiffs in error.*Mr. Philip Phillips* contra.

MR. JUSTICE STRONG, after stating the case, delivered the opinion of the court.

The errors now assigned are exclusively to the charge given by the court to the jury. The instruction given was (*inter alia*) as follows: "But if they (the defendants) had no legal claim or demand against the complainant (Sonneborn), then, whether they had probable cause or not, they had no right to institute the proceedings (in bankruptcy). They cannot go back and allege that, though they had no legal claim against him, they thought they had; in other words, that they had probable cause to believe that they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all.

"Their defence cannot stand on two probable causes, one on top of the other. . . . As it has been adjudicated by the Circuit Court of Barbour County, and affirmed by the state Supreme Court, that the defendants never had a legal claim against the plaintiff, and therefore had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court therefore rules that the defence in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed an act of bankruptcy; but it being shown by judicial determination that they had no legal claim or debt against the plaintiff, and had, therefore, no right to institute bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of damages, under the circumstances

of the case. . . . We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained, at all events." . . . And again: "The actual damages sustained by the complainant, that you will give him a verdict for, at all events."

This construction, we think, was erroneous, and emphatically so, in view of the facts which appeared in evidence. It ignores totally the question whether the conduct of the defendants had been attended by malice, though the plaintiff's declaration charged malice, and it denied all importance to the necessary inquiry, whether they had probable cause for their action. More than this, it disregarded entirely evidence of facts which have been determined to be in law a perfect defence to an action for a malicious prosecution. The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim, and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fail in his suit. His intentions may have been most honest, his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill-feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the Circuit Court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding. (*Nicholson v. Coghill*, 4 Barn. & Cress. 21; *Webb v.*

Hill, 3 Carr. & P. 485; *Burhams v. Sanford*, 19 Wend. (N. Y.) 417; *Cotton v. Huidekoper*, 2 Pa. 149.)

In *Farmer v. Darling*, 4 Burr. 1791, one of the earliest reported cases, if not the earliest, Lord Mansfield instructed the jury that the "foundation of the action was malice," and all the judges concurred that "malice, either express or implied, and the want of probable cause, must both concur." From 1766 to the present day, such has been constantly held to be the law both in England and this country. (See a multitude of cases collected in Vol. 8, U. S. Digest, first series, 942, pt. 95.) And the existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice from the want of probable cause is one which the jury alone can draw. (*Wheeler v. Nesbit et al.*, 24 How. 545; *Newell v. Downs*, 8 Blackf. (Ind.) 523; *Johnson v. Chambers*, 10 Ired. (N. C.) 1. 287; *Voorhees v. Leonard*, 1 N. Y. Sup. Ct. 148; *Schofield v. Ferrers*, 47 Pa. St. 194.) In *Mitchell v. Jenkins*, 5 Barn. & Adol. 588, Lord Denman said: "I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury." He added, that inasmuch as in that case the question of malice had been wholly withdrawn from the jury there ought to be a new trial. In the case we have in hand, the question was withheld from the jury, and nothing was submitted to them but an estimate of damages.

There was also error in the charge, in so far as it took away from the defendants the protection of probable cause for their instituting the proceedings in bankruptcy. The court ruled that the defence could not be sustained by proving they had probable cause for believing the plaintiff had committed an act of bankruptcy, because, after the proceedings had been commenced, it was established by a verdict and a judgment thereon that the plaintiff was not indebted to them, and consequently that they had no right to institute bankruptcy proceedings against him. It was further charged that "if they

had no legal claim or demand against the plaintiff, then whether they had probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that though they had not a legal claim or debt against him, they thought they had or that they had probable cause to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all." To this we cannot assent. The existence of a want of probable cause is, as we have seen, essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice. (*Sutton v. Johnstone*, 1 T. R. 493; *Murray v. Long*, 1 Wend. (N. Y.) 140; *Wood v. Weir & Sayre*, 5 B. Mon. (Ky.) 544.) It is true that what amounts to probable cause is a question of law in a very important sense. In the celebrated case of *Sutton v. Johnstone*, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law." This is the doctrine generally adopted. (*McCormick v. Sisson*, 7 Cow. (N. Y.) 715; *Besson v. Southard*, 10 N. Y. 236.)

It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. (*Taylor v. Williams*, 2 Barn. & Adol. 845.) There may be, and there doubtless are, some seeming objections to this rule, growing out of the nature of the evidence, as when the question of the defendants' belief of the facts relied upon to prove want of probable cause is involved. What their belief was is always a question for the jury.

The Circuit Court thought in the present case, and so charged, that the fact that after the institution of the bankruptcy proceedings a judgment was given in the Barbour Circuit Court against the defendants, thus determining that the plaintiff was

not indebted to them, precluded them from setting up that they had probable cause for their action. That was giving undue effect to the judgment. The conduct of the defendants is to be weighed in view of what appeared to them when they filed their petition in the bankrupt court, — not in the light of subsequently appearing facts. Had they reasonable cause for their action when they took it? Not what the actual fact was, but what they had reason to believe it was. (*Faris v. Starke*, 3 B. Mon. (Ky.) 4, 6; *Raulston v. Jackson*, 1 Sneed (Tenn.) 128.)

In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed, but its failure has never been held to be evidence of either malice or want of probable cause for its institution; much less that it is conclusive of those things. (*Cloon v. Gerry*, 13 Gray (Mass.) 201; 1 Hilliard, Torts, and cases there collected.) The final judgment in the Circuit Court of Barbour County did not, therefore, justify the court in charging either that there was no probable cause for the bankruptcy proceedings, or that the presence or absence of such cause was immaterial. If when they filed their petition to have the plaintiff declared a bankrupt, the defendants believed, and had reasonable cause to believe, that the plaintiff was indebted to them for the goods sold to E. Leipzeiger & Co. in 1867, and had reasonable cause to believe that he had committed an act of bankruptcy, there was probable cause for their action, and the plaintiff was not entitled to recover. That they had reasonable cause to believe an act of bankruptcy had been committed must be conceded in view of the manner in which the judgment of Jonas Sonneborn against him had been obtained on the 12th of June, 1873, and in view of the decision of this court in *Buchanan v. Smith*, 16 Wall. 277. If, therefore, they had an honest and reasonable conviction that the plaintiff was their debtor, that he was liable to them for the bills of goods sold by them in 1867 to Leipzeiger & Co., they had probable cause for instituting the proceedings in bankruptcy, and their defence was complete. The jury should have been so instructed.

We think, also, there was error in refusing to charge the jury as requested in the defendants' first point, which was as

follows: "If the jury believe, from all the evidence, that A. T. Stewart & Co. acted on the advice of counsel in prosecuting their claim against Sonneborn in the Circuit Court of Barbour County, and upon such advice had an honest belief in the validity of their debt, and their right to recover in said action; and in the institution of the bankruptcy proceedings acted likewise on the advice of counsel, and under an honest belief that they were taking and using only such remedies as the law provided for the collection of what they believed to be a *bona fide* debt, they having first given a full statement of the facts of the case to counsel, — then there was not such malice in the wrongful use of legal process by them as will entitle the plaintiff to recover in this form of action." This the court refused to affirm, "except as contained and qualified in the preceding charge." An examination of the charge, however, reveals that the instruction was not contained in it, nor alluded to. The defendants, we think, had a right to have it affirmed as presented. There was enough in the evidence to justify its presentation. It was proved that, before they commenced their suit in the Circuit Court of Barbour County, the defendants were advised by an eminent lawyer of Alabama, of twenty-five years' standing in the profession, respecting their legal right to recover the debt from the plaintiff, that, in his opinion, the plaintiff was liable therefor. It was further testified that the same lawyer advised them that, in his opinion, the plaintiff had rendered himself liable to involuntary bankruptcy proceedings by suffering his brother's judgment to go against him by default, and by advertising his entire stock of goods at and below New York cost. It was not until after this advice had been given that the petition in bankruptcy was prepared and filed.

That the facts stated in the point proposed, if believed by the jury, were a perfect defence to the action; that they constituted in law a probable cause, and being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover, is, in view of the decisions, beyond doubt. (*Snow v. Allen*, 1 Stark. 502; *Ravenga v. Mackintosh*, 2 Barn. & Cress. 693; *Walter v. Sample*, 25 Pa. St. 275; *Cooper v. Utterbach*, 37 Md. 282; *Omstead v. Partridge*, 16 Gray (Mass.)

381.) These cases, and many others that might be cited, show that if the defendants in such a case as this acted *bona fide*, upon legal advice, their defence is perfect.

* * * * *

*Judgment of the Circuit Court reversed.*¹

BRADLEY, J., dissented on the ground that being a creditor is a condition precedent to the right to institute proceedings in bankruptcy.

ZINN v. RICE.

(154 Mass. 1. — 1891.)

THE present defendant, in a contract action against the present plaintiff to recover \$4,522.45, laid his damages in his writ at \$40,000, and levied several attachments on real property of great value and on stock worth \$100,000. In this suit plaintiff sought to recover damages for such malicious levies of excessive attachments, but was nonsuited on the ground that the prior action had not been terminated, and excepts.

W. ALLEN, J. It is not contended that the facts alleged in the declaration, and offered to be proved at the trial, are not sufficient to sustain an action by the plaintiff against the defendant. The defendant's contention is that the action is prematurely brought; that it is an action for malicious prosecution, and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for

¹ Judgment in a former action, unless obtained by fraud, is evidence of probable cause, although reversed on appeal. (*Crescent C. L. S. Co. v. Butchers' Union*, 120 U. S. 141; *Adams v. Bicknell*, 25 N. E. 804 (Ind. 1890).) What is such a termination of former action as will maintain this action? (*Cardinal v. Smith*, 109 Mass. 158; *Hyde v. Greuch*, 62 Md. 577.)

The action is maintainable against a corporation; (*Copley v. G. & B. S. M. Co.*, 2 Woods, 494; 28 Myers, Fed. Dec. p. 337; *Reed v. Home S. Bk.*, 130 Mass. 443;) and for the malicious prosecution of civil suits, (*Smith v. Burrows*, 106 Mo. 94, 16 S. W. 881; but see Cooley on Torts, 2d ed. 217.)

maliciously instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause. The latter, being for the malicious use of legal process by acts authorized by its terms, may be called "actions for malicious prosecution," to distinguish them from actions for the abuse of process by doing under color of legal process acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered him in the first while that issue is pending. The rule is, by its terms and nature, limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution, and in defence to which falsity of the charge cannot be shown. (*Parker v. Langly*, 10 Mod. 209; *Fortman v. Rottier*, 8 Ohio St. 548; *Bump v. Betts*, 19 Wend. 421; *Barnett v. Reed*, 51 Pa. St. 190; *Jennings v. Florence*, 2 C. B. (N. S.) 467; *Churchill v. Siggers*, 3 El. & Bl. 929; *Wentworth v. Bullen*, 9 Barn. & C. 840; *Wood v. Graves*, 144 Mass. 365; *Everett v. Henderson*, 146 Mass. 89; *Savage v. Brewer*, 16 Pick. 453; *Bicknell v. Dorion*, Id. 478.) In the case at bar the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the plaintiff had a good cause of action, and that there is no defence to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and, under color of it, did things not authorized by its terms. His grievance is that the defendant, having a just cause of action, and a legal suit against this plaintiff, made an excessive attachment of property, which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

The defendant contends that the amount of the debt must be fixed by the determination of the former suit, and that it

cannot be shown in this suit. We know of no authority or reason for this. The amount of the debt cannot exceed the amount declared for in the suit, and that is admitted to be due, so far certainly as affects this suit. Beyond that there is no question in the former suit, and no issue, and the proceedings complained of were *ex parte*, and they were terminated by the reduction of the attachment. It is argued that the plaintiff in that suit may amend his declaration, and introduce a new cause of action. That case, as stated by the plaintiff himself, does not present any issue involved in the case at bar, and the possibility that a new cause of action may be added, if it existed, would not be sufficient to show that the issues presented in this case are pending in that, or to bring it within the terms or reason of the rule that the liability of this plaintiff to such possible cause of action can be tried only in that action.

Exceptions sustained.

SECTION 4. CONSPIRACY.

PLACE v. MINSTER.

(65 N. Y. 89. — 1875.)

Amasa J. Parker and *Geo. M. Curtis* for the appellant.

Samuel Hand for the respondent.

DWIGHT, C. The defendants urge that the judge at the trial should have nonsuited the plaintiff on the ground that there was no evidence to go to the jury to substantiate the charge made in the complaint. They urge this on two grounds. One is, that if the testimony of the plaintiff's witnesses were wholly credible, there is a clear departure in the testimony from the complaint, so that it is "improved in its entire scope and meaning." The other is, that the plaintiff's case rests on the testimony of an accomplice in the fraud, James Sherlock. And that he has so contradicted himself and was so influenced by fear of the hope of reward that his statements should not have been taken into account, but that the court should have rejected them as a matter of law. The first of these objections

to the plaintiff's recovery requires an examination, to some extent, of the testimony. . . .

The testimony, assuming for the moment that full credit should be given to it, discloses that the defendants L. Minster and Kohn did not specifically direct the goods to be purchased in L. Minster's name. The plaintiff's own testimony is, that Sherlock told him that he had got orders from L. Minster (in whose name L. Minster and Kohn were doing business). He packed the goods by Sherlock's direction, and shipped them to L. Minster. The first order was sent 20th June, 1865, to the value of \$2814, together with samples worth seventy dollars. On July 7th, Sherlock told the plaintiff that he was going to New York and wished more samples. He then said that he had another order for another lot of gloves, and they were directed and shipped as before to the amount of \$2279, together with samples worth seventy-eight dollars. Other shipments were made on similar orders, down to the 4th or 5th of August. On the last of these days, he being in New York, received from Sherlock a check, signed L. Minster, for \$1200. Shortly after August 11, 1865, the plaintiff saw L. Minster at his store, and asked him if he had paid Sherlock for the goods they had had of himself. Minster denied that they had bought any goods of the plaintiff, and said that they did not owe Sherlock anything.

On cross-examination the plaintiff testified that while he was in New York looking after the payment of his bill, he saw Minster in his store, but had no conversation with him about the goods, although he had then sent more than half of them. As far as is shown, not a word passed between him and the defendants as to their connection with the transaction, though the opportunities for such inquiry were at hand, and the sales were large enough to have attracted a seller's attention to their prompt adjustment, and payment by Sherlock was but partial and dilatory. It is true that the plaintiff testifies that bills were originally made out in L. Minster's name. These were, however, subsequently surrendered to Sherlock, on his representation that Minster would not pay unless bills were made out in Sherlock's name. This was done ac-

cordingly, although it is charged by the plaintiff that this was a part of the fraudulent conspiracy to obtain his goods without payment.

Without further detail of the testimony in this branch of the case, I think it clear that there was no specific understanding that the goods should be sold to L. Minster, as charged in the complaint. The most that can be said is, that there was an ambiguity of expression in the language of Sherlock, and that the plaintiff may have supposed that there was an order on the part of Minster for the goods, though there was no direct statement that the goods were sold to him. All that was proved with any distinctness was that there was a conspiracy between Sherlock and L. Minster and Kohn, that the goods should be sold to Sherlock, and that he should go through the form of selling them to Minster & Kohn; that Sherlock should then abscond from the country and conceal himself in such a way that no testimony from him would be available, and that Minster & Kohn would then be able to represent that they bought the goods from Sherlock, and were in no respect liable to the plaintiff. Such a fraud would differ from the one charged in the complaint, in the fact that in *that* the conspiracy was alleged to be to sell to L. Minster, who was no member of the firm of Minster & Kohn, and who might deny the sale, while, as proved, Sherlock was to be the purchaser, and a subordinate contract was to be entered into as between him and the defendants.

That such a combination as this proved would amount to a conspiracy in law is deducible from the authorities. The essence of a conspiracy, so far as it justifies a civil action for damages, is a concert or combination to defraud or to cause other injury to person or property, which actually results in damage to the person injured or defrauded. All the necessary elements are present, according to the case made by the plaintiff. (*Page v. Parker*, 43 N. H. 363; *Wiggins v. Leonard*, 9 Iowa, 195; *Whitman v. Spencer*, 2 R. I. 124; *Walsham v. Stainton*, 33 Law J. Ch. 68.)

The act charged to result in a conspiracy may, in one aspect of the case, be innocent; in another it may be fraudulent. It will be necessary to consider the intent with which the act

was done, so that the question will be peculiarly for the consideration of the jury. In *Whitman v. Spencer, supra*, a New York merchant purchased goods from a dealer in Providence, Rhode Island, to the amount of \$6000, upon credit, and assigned them, without consideration, by a clear bill of sale, and the assignee removed the goods to Providence, where they would be free from attachment, and sold them there, saying that he intended to pay the creditors of the New York merchant, whose claims he had guaranteed, at the same time refusing to give a list of the creditors, such list being also refused by the vendor. It was held under this state of facts that the question whether there was a conspiracy or not depended solely on the intent. If the goods were taken to Providence with the *bona fide* intent to sell them for the benefit of the creditors, there was no conspiracy. On the other hand, if there was an intent to secrete them, a conspiracy existed. The whole matter accordingly, it was considered, must go to the jury. In the case at bar, if Sherlock and the defendants contrived a plan whereby Sherlock was to get the title to the goods and then go through the form of sale to the defendants, and he was to abscond, so that the true history of the transaction could not be traced, and the defendants could get the goods without paying for them, the conspiracy would clearly be established. This would be so, though Sherlock was the only active participator in the fraudulent statements, and the defendants were wholly passive and silent as between themselves and the plaintiff. (*Page v. Parker, supra.*) It would seem to be a fraudulent conspiracy, even though Sherlock made no affirmative false statement to the plaintiff, but simply bought the goods with a preconceived design, as between himself and the defendants, not to pay for them, and to put out of the way all accessible evidence of their wrongful act. Such a fraudulent concealment of the true nature of a dealing, which on its face appears to be an ordinary sale, would be a fraud of a deep dye. Designing men cannot be allowed to put forth a supple tool to do their bidding, knowingly take the profits of a concocted wrong, remain silent, and go unwhipped of justice. The action for conspiracy is devised for just such cases. It reaches the silent partners in the transaction, and

causes them to disgorge the profits of their hidden guilt. It is, thus, a highly remedial action, and in no respects to be discouraged, when resorted to in cases which fairly admit of its application. If the testimony in this cause most favorable to the plaintiff is true, the present is emphatically one of those cases to which the law should be applied with an unsparing hand, as the more active agent was plainly weak and vacillating and only upheld by the strong will and fortifying purpose of men of bolder design and firmer nerve.

The correctness of these views is distinctly sustained by the judgment in *Moore v. Tracy*, 7 Wendell, 229. In that case Tracy brought an action on the case for a conspiracy against W. and A. Moore, charging them with entering into a fraudulent combination with one J. Van Valkenburgh to the following effect: Van Valkenburgh was to buy and obtain of the plaintiff various goods under the pretence of a fair and *bona fide* purchase, but not intending to pay for the same, and the goods so obtained were to be delivered into the possession of the defendants; Van Valkenburgh should then declare himself insolvent, and obtain a discharge under the insolvent act, and thereby defeat the collection of the plaintiff's demand. It was further charged that in pursuance of such conspiracy, Van Valkenburgh, under the pretence of a fair and honest purchase, obtained from the plaintiff certain articles of property, which were delivered to the defendants, or one of them, and by them disposed of to their own use. The facts alleged in the complaint having been proved at the trial, mainly by the testimony of the co-conspirator, Van Valkenburgh, the court, on appeal, held that the complaint disclosed a good cause of action, and affirmed a judgment rendered against the Moores. *Pasley v. Freeman*, 3 Term R. 56, was among other cases relied on. It was said: "In the case at bar the defendants reaped all the fruits of the fraud, but had no personal communication with the plaintiff. The declaration does not charge them with doing any act to induce the plaintiff to sell his goods to Van Valkenburgh, but he must be considered their *agent*, and his false and fraudulent representations (that he intended to and would pay for the goods, when it had previously been determined between him and the defendants that

he should immediately put them into the hands of the defendants and take the benefit of the insolvent act) must be considered the *acts* and *declarations* of the defendants themselves." (P. 235.)

The parallel between the case just cited and that before the court is very close. In the present case there was no direct act between Minster and Kohn and the plaintiff. All the inducement to sell came from Sherlock. Yet if the testimony is true, those persons reaped the benefit of the fraud, and combined with him to commit it. His act must be deemed to be their act, and if the case of *Moore v. Tracy* is to be followed, they must respond to the plaintiff.

Assuming, then, that the testimony as actually given in, established a case of fraudulent conspiracy, did it differ so much from that alleged in the complaint that the variance is fatal under our practice? It seems to me that this difference does not present a case where the cause of action is "unproved in its entire scope and meaning," within the construction of the Code. (Sec. 171.) It is rather a variation of detail, or in the mode in which the fraud is carried into effect. The elements of fraud are present under either aspect of the case; there is a false representation, fraudulent intent, a preconceived design not to pay for the goods, a material statement and a reliance by the plaintiff upon it, and consequent injury to him in parting with his property. There is, undoubtedly, a variance, but no absolute departure from the original theory of the case. It will not be expedient to hold to a rule so rigorous as that for which the defendants contend, in cases of alleged fraud involving a conspiracy. The evidence is all in the breasts of the alleged conspirators. The plaintiff is groping in the dark. He obtains an imperfect version of the facts, sufficiently distinct, however, to torture one of the conspirators, ultimately to divulge them in full. These are drawn forth slowly and imperfectly, with attempts at concealment or with actual prevarication. He finally became so completely entangled in the meshes of a net of his own devising, that he finds but one way out. He cuts the cords and sets himself free. For the first time he tells a straightforward story, differing from the partial account on which the plaintiff framed

his complaint. If all the elements of fraud are found in the case as proved, shall the complaint be dismissed, and the plaintiff be required to commence a new action? I think not. If the defendants feel themselves aggrieved they may make an affidavit under section 169 of the Code, showing that they have been misled to their prejudice; whereupon the court may allow them to amend on such terms as may be just, to enable them to prepare their defence according to the new phase which the plaintiff's case has assumed. Without such proof *aliunde*, or from extraneous sources, the variance is immaterial. Such is the rule of the Code, however it may depart from the doctrines of the common law. (*Catlin v. Gunter*, 11 N. Y. 374, 375; *Sharp v. Mayor of New York*, 40 Barb. 270.) I have not been able, after considerable examination, to find any authority to justify the court in the case at the bar in holding that there has been a failure of proof.

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Judgment affirmed.

WILDEE v. McKEE.

(101 Pa. St. 335. — 1885.)

STERRETT, J. It cannot be doubted that trespass on the case for conspiracy to defame and thereby injure another in his particular avocation or business may be maintained whenever, in pursuance of such unlawful combination, means have been employed which tended to effectuate and, to a greater or less extent, accomplished the object of the conspirators. (*Mott v. Danforth*, 6 Watts, 304-6; *Haldeman v. Martin*, 10 Barr. 369; *Hood v. Palm*, 8 Id. 237-9.) In the last case it is said: "A conspiracy to defame by spoken words, not actionable, would be a subject of prosecution by indictment; and if so, then equally so a subject of prosecution by action, by reason of the presumption that injury and damage would be produced by the combination of numbers. . . . Defamation by the outcry of numbers is as resistless as defamation by the written act of an

individual. The mode of publication is different ; and it is for this reason that an action lies, at the suit of one who has been the subject of a conspiracy, whenever an indictment would lie for it." As an illustration of the principle, it is said an indictment lies for a conspiracy to vex or annoy another, for instance, to hiss a play or an actor, right or wrong ; and hence, if the subject of such a conspiracy has been damnified thereby, a civil action may be maintained. Words which impute the want of integrity or capacity, whether mental, moral or pecuniary, in the conduct of a profession, trade or calling, in which the party unjustly accused is engaged, are actionable.

The only question suggested by this record is whether in the declaration, drafted by himself, the plaintiff has presented a case that fairly comes within the principles recognized by the foregoing authorities. If he has, the learned court erred in entering judgment for the defendants on the demurrer. In considering the question, it must be borne in mind that the defendants by demurring to the declaration, admit for present purposes the truth of all matters well pleaded therein. It follows therefore that all matters recited in the declaration by the way of inducement, or charged therein to have been done or committed by the defendants, so far as they are not wholly irrelevant, must be accepted as true. Plaintiff avers in substance, that prior to the commission by the defendants of the several grievances thereafter mentioned he had deservedly earned and enjoyed the confidence and esteem of his neighbors and acquaintances ; that he was employed as a teacher by the Central Board of Missions of the Reform Presbyterian Church and engaged in "the business and profession of a teacher, whereby he acquired great gains, profits and advantages, and had always conducted himself in said business and profession with capacity, uprightness, obedience, probity," &c. He then charges *inter alia*, as follows : " Yet the defendants, well knowing the premises and greatly envying the happy state and condition of said plaintiff, but contriving and falsely and maliciously intending to injure him in his good name, fame and credit, and in his aforesaid business and profession, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens . . . and cause it to be suspected

and believed that said plaintiff was not fit to be employed as a teacher, and that he was chargeable with insanity and monomania . . . and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff in his aforesaid business and profession, and otherwise, . . . wickedly, unlawfully and maliciously, did agree, confederate, combine and form themselves into a conspiracy to defame.”

It is conceded that the foregoing recitals and averments, without more are insufficient, but the plaintiff proceeds to charge “that the said defendants having conspired with their confederates as aforesaid, further contriving and intending as aforesaid, heretofore and in pursuance and execution of their said conspiracy, to wit, on the day and year aforesaid, at Allegheny county aforesaid, in a certain discourse which the said defendants had in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in his said business and profession, and of and concerning his capacity and behavior while he was in the employ of the said Board . . . as aforesaid, the false, scandalous, malicious and defamatory words following, that is to say, “The man (meaning the said plaintiff) must not be right in his mind, thereby meaning that the said plaintiff was incapacitated for his said business and profession on account of insanity and monomania on the subject of adultery and whoredom.” Coupled, as this count is, with the recitals and averments by which it is preceded, and followed by an averment of special damages, we cannot, in view of the authorities above referred to, say the charge therein contained is not actionable. We have no right to indulge in any speculation as to the answer the defendants may make to the charges contained in the declaration. They elected by their demurrer to take the position that the recitals and charge contained in the declaration, assuming them to be true, are insufficient to warrant a verdict and judgment in favor of plaintiff.

In this they were sustained erroneously as we think by the court below.

CHAPTER IX.

SECTION 2. TRESPASS.

HAY v. THE COHOES CO.

(2 N. Y. 159. — 1849.)

HAY sued the Cohoes Company, a corporation chartered by act of the legislature (Stat. 1826, p. 72) in the Court of Common Pleas of Albany County. The declaration, which was in case, alleged, among other things, that the defendants at, etc., by their agents and servants, wrongfully and unjustly blasted and threw large quantities of earth, gravel, slate and stones upon the dwelling house and premises of the plaintiff, and shut and darkened the windows of said house, obstructed the light, and broke the windows, doors, etc., to the damage of the said plaintiff. Plea, not guilty. On the trial the plaintiff gave evidence tending to prove his declaration, and, among other things, that the agents of the defendants, in excavating a canal upon land of which they claimed to be owners, knocked down the stoop of his house and part of his chimney, and, as it appeared, for the purpose of protection, placed boards, or rough window blinds, on all the front windows of the plaintiff's house, by which the light was obstructed, etc. The defendants moved for a nonsuit, and, among other things, insisted that to make them liable it was incumbent on the plaintiff both to aver and prove that there was negligence, unskilfulness, wantonness or delay, and this the plaintiff had failed to do. The Court of Common Pleas nonsuited the plaintiff, to which an exception was taken. On error brought, the Supreme Court reversed the judgment, and granted a new trial (see 3 Barb. Sup. Court Rep. 42), from which decision the defendants appealed to this court.

D. Wright for appellants.

E. F. Bullard for respondent.

GARDINER, J. The defendants insist that they had the right to excavate the canal upon their own land, and were not responsible for injuries to third persons, unless they occurred through their negligence and want of skill, or that of their agents and servants.

It is an elementary principle in reference to private rights that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others; otherwise it might be made destructive of their rights altogether. Hence the maxim *sic utere tuo*, etc. The defendants had the right to dig the canal. The plaintiff the right to the undisturbed possession of his property. If these rights conflict the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For, if the defendants, in excavating their canal, in itself a lawful use of the land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. (*Aldred's Case*, 9 Coke, 58.) He may excavate a canal, but he cannot

cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner.

* * * *

In this case the plaintiff was in the lawful possession and use of his property. The land was his, and, as against the defendant, by an absolute right from the centre *usque ad cælum*. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises (*Morley v. Pragnell*, Cro. Car. 510), nor abstract any portion of the soil (Rol. Abr. 565, note; 12 Mass. 221), nor cast anything upon the land (*Lambert v. Bessy*, Sir T. Raymond, 421), by any act of their agents, neglect or otherwise. For this would violate the right of domain. Subject to this qualification the defendants were at liberty to use their land in a reasonable manner, according to their pleasure. If the exercise of such a right upon their part operated to restrict the plaintiff in some particular mode of enjoying his property, they would not be liable. It would be *damnum absque injuria*.

No one questions that the improvement contemplated by the defendants upon their own premises was proper and lawful. The means by which it was prosecuted were illegal notwithstanding. For they disturbed the rightful possession of the plaintiff and caused a direct and immediate injury to his property. For the damages thus resulting the defendants are liable. Without determining the other questions discussed upon the argument we think, upon the ground above stated, that the judgment of the Supreme Court should be affirmed.

*Judgment affirmed.*¹

¹ If A permits the branches of fruit trees to overhang his land, the owner of the trees may enter A's close and collect the fruit, even though it has fallen, "Because ripe fruit naturally falls." *Millen v. Fawdry*, Latch, 11 Cf. *Lyman v. Hale*, 11 Conn. 177; *Hoffman v. Armstrong*, 48 N. Y. 201.

BOOTH v. ROME RY.

(140 N. Y. 267. — 1893.)

ANDREWS, C. J. We entertain no doubt of the correctness of the ruling at the circuit that the defendant stands in no better position in defending the action than if the controversy was between individuals. The rule that the Legislature may, in the public interest and for public purposes, authorize and legalize acts causing consequential injury to private property, not amounting to a taking, without providing compensation, and that the legislative authority may be pleaded in bar of any claim for indemnity, although if the act had been done without such authority an action would lie, has no application to acts of a railroad or other private corporation in the execution of chartered or statutory powers. The rule adverted to, although operating in some cases with great severity, which compels an individual to bear a special loss for the benefit of the community at large, in place of distributing the burden, is an application of the maxim, "*salus populi est suprema lex*," and rests upon the transcendent power of the Legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad carries with it immunity from liability in executing the work for consequential damage to private property, to the same extent as pertains to the sovereign in executing public works, (*Bellinger v. Railroad Co.*, 23 N. Y. 42,) it is now the settled doctrine in this State that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual, (*Cogswell v. Railroad Co.*, 103 N. Y. 10.) This doctrine accords with reason, and with the presumed intention of the Legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which will result from the construction of its road.

The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges, they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent. There may be limited exceptions, as in cases of highway crossings, where an adjustment of the grade becomes necessary, working a consequential injury to adjacent landowners, which is remediless; and the legislative authority will also bar any remedy for certain discomforts consequent upon the necessary operation of the road, such as noise and smoke of passing trains. We therefore agree with the courts below that the right of the plaintiff to recover in this case, and the liability of the defendant, depend upon the same rule as would govern the parties if both were natural persons, and the injury to the plaintiff's dwelling had resulted from blasting by an adjacent owner on his land in the course of adapting it to individual uses.

The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving way before the excavation was commenced. But, the verdict having been affirmed by the General Term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting would not alone sustain the action. It must further appear that the defendant, in using explosives, violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur, to create a cause of action. If the injury was occasioned by the omission to use due care, this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded. If one, by carelessness in making an excavation on his own land, causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable. (*Leader v. Moxton*, 3 Wils. 460; *Lawrence v. Railway Co.*, 16 Adol. & E. (N. S.) 643-653; *Leake*, Real

Prop. 248.) The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights. This would be reasonable care only under the circumstances. If it was practicable, in a business sense, for the defendant to have removed the rock without blasting, although at a somewhat increased cost, the defendant would, we think, in view of the situation, and especially after having been informed of the injury that was being done, have been bound to resort to some other method. There is evidence that rock from some parts of the excavation was loosened by the use of iron bars, and, if this was practicable as to all of it, the jury might well have found that this means should have been adopted. So, also, if less powerful blasts might have been used, which, if used, would not have occasioned injury, or would have lessened it, the omission to use them might well be considered as negligence. The mode of exercising a legal right, where there is a choice of means, may of itself give a cause of action. The plaintiff, however, on this record, is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial, and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on his own premises in order to adapt them to a lawful use; the mode adopted being the only practicable one, and the work having been prosecuted with due care and without negligence. The question is whether the act of the defendant, connected with the resulting injury, was a legal wrong, for which the plaintiff has a right of action.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal

rights in his neighbor to the use of his property, so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impreguably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use by one of his own property, which annoys or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is that one may not use his own property to the injury of any legal right of another. The cases are numerous where the lawful use of one's property causes injury to adjacent property, for which there is no remedy, because no right of the adjacent owner is invaded, although he suffers injury. The cases of excavation furnish a striking illustration. The easement of natural support of the land of one by the land of the adjacent owner applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one, by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. There is, in the case supposed, injury, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property. (*Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mees. & W. 220; *Lasala v. Holbrook*, 4 Paige, 170; *Thurston v. Hancock*, 12 Mass. 220.)

The fundamental proposition upon which the plaintiff's counsel rests his argument in support of the recovery is that the use of the explosives in blasting constituted, under the circumstances, a private nuisance, and that, according to the general rule of law, one who creates or maintains a nuisance is liable for any special injury to person or property resulting therefrom. The right of the defendant to excavate on its land for its roadbed is not challenged, but the right to use the destructive agency of gunpowder in the work of excavation, liable to produce injury, and which did occasion it, is denied. The exception is not to

the thing done, but to the mode of doing it. It is to be observed, however, that, under the concessions in the case and the rulings on the trial, it must be assumed that the excavation could not have been done except by the use of explosives. This mode of doing the work was therefore of the substance of the right, if the right existed at all. It has been frequently said that the right of an owner of land to use his property as he likes does not justify the maintaining of a nuisance or the commission of a trespass; and Blackstone, after stating that where one, by smelting works on his own land, causes noxious vapors, which injure the corn or grain on his neighbor's land or damage his cattle, this would be a nuisance, proceeds to say "that if you do any other act in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive." (2 Bl. Comm. c. 13, p. 218.) There are many illustrations in the books of the doctrine stated by the learned commentator, that the use of one's own land for the purpose of a lawful trade may become a nuisance to his neighbor. But whether a particular act done upon, or a particular use of, one's own premises, constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place, and circumstances. It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although they bring annoyance, discomfort, or injury to his neighbor, which are *damnum absque injuria*. The case of the building caused to fall by an excavation in an adjoining lot, already referred to, is an illustration. The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein, and to be discharged into an adjacent mine on a lower level, thereby causing damage to the mine of such adjacent owner, is another illustration of a lawful use of property, followed by damage to the property of another, for which no action lies. (*Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Wilson v. Waddell*, 2 App. Cas. 95.) In referring to these cases in *Hurdman v. Railway Co.*, 3 C. P. Div. 168,

the court said: "The owner of lands holds his right to the enjoyment thereof subject to such annoyance as is the consequence of what is called the 'natural use by his neighbor of his land,' and that, where an interference with his enjoyment by something in the nature of a nuisance is the cause of complaint, no action can be sustained, if this is the result of a natural use by a neighbor of his land." Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the vicinity, and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitutes nuisances, and such use is not justified by the right of property. (*Fish v. Dodge*, 4 Denio, 311; *McKeon v. See*, 51 N. Y. 300; *Cogswell v. Railroad Co.*, *supra*.) These and like cases are those where the property of the owner is appropriated to a permanent use, which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous, and temporary acts, which are resorted to in the course of adapting premises to some lawful use. For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises; but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property? having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy.

The rule announced by the trial judge, that the use, by an

owner of property, of explosives, in excavating his land, is at his peril, and imposes liability for any injury caused thereby to adjacent property, irrespective of negligence, is far-reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing, when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent, or tend to prevent, the improvement of property. The first occupant, in building on his lot, exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. (*Platt v. Johnson*, 15 Johns. 213; *Thurston v. Hancock*, *supra*; *Tipping v. Smelting Co.*, 1 Ch. App. 66; *Campbell v. Seaman*, 63 N. Y. 568.) The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling; but it cannot, we think, exclude the former from using the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.*, 2 N. Y. 159, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defend-

ant of the land of the plaintiff. This, the court held, could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. The case of *Benner v. Dredging Co.*, 134 N. Y. 156, was the case of an injury to the plaintiff's house, resulting from the jarring caused by the blasting of rocks in Hell Gate; and it was held that the injury was remediless, for the reason that the defendant was acting under the authority of the Government of the United States, by virtue of a contract authorized by Congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby. (*Myers v. Malcolm*, 6 Hill, 292; *Heeg v. Licht*, 80 N. Y. 579.) So, also, it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action. (*City of Tiffin v. McCormack*, 34 Ohio St. 638; *Scott v. Bay*, 3 Md. 431.) Many of the cases cited by the counsel are cases of the permanent appropriation of property, for damages, or noxious uses causing damage. The distinction between such cases and those where the injury arises from acts done in the necessary adjustment of property for a lawful use by means necessary, and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent landowners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In *Marvin v. Mining Co.*, 55 N. Y. 557, the opinion of the learned judge who wrote in that case sustains the conclusion we have reached in this case. But the point was not necessarily involved, since it was held that the defendant there had acquired by grant the right to employ blasting in removing the mineral, and that the plaintiff, a subsequent grantee of the surface, could not complain of injury to his house therefrom, in the absence of negligence on the part of the defendant in conducting the work.

Judge Folger, in that case, said : " Whatever it is necessary for him [defendant] to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do, though it harm erections lately put there." If the learned judge intended to lay down the rule that the owner of land may do anything on his own land which would do no injury to the adjacent property if it had remained in its natural state, the proposition is probably too broad. One may do in a barren waste many things which he could not lawfully do in or near an inhabited town. But the defendant here was engaged in a lawful act. It was done on its own land, to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land ; but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use ; that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested, also, in the preservation of property and property rights from injury. Will it, in this case, protect the

plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual, and generally harmless? We think not. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur.

MERRITT v. HILL.

(37 Pac. R. 893. — Cal. 1894.)

VAMOLIEF, C. The substance of the complaint in this action is that, while plaintiffs were owners and in possession of about eight sections of land in Trinity County (not alleged to have been inclosed), "defendants' cattle and horses ran and trespassed upon said lands, ate up, injured, and destroyed the grass, hay, and verdure being and growing thereon," to the damage of plaintiffs in the sum of \$1,000. It is not alleged that the trespass was instigated by defendants, nor that defendants had notice thereof. A demurrer to the complaint on the ground that it does not state a cause of action was sustained by the court, and, plaintiffs having declined to amend their complaint, judgment passed for the defendants. Plaintiffs bring this appeal from the judgment on the judgment roll, and contend that "at common law the rule was that every man must, at his peril, keep his cattle on his own land; and if he fails he is liable for their trespass on the land of others, whether fenced or unfenced;" citing 3 Bl. Comm. 211; Cooley, Torts, 337; Pol. Code, § 4468.

In 1850 the Legislature of this State enacted that "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all courts of this State;" and section 4468 of the Political Code is to the same effect. Yet it has been held in several cases that the common law rule as to trespassing animals, claimed by appellants to be applicable to this case, is

inconsistent with certain general legislative acts which have always been in force in this State, except as repealed by local laws applicable to some particular counties, of which Trinity is admitted not to be one; and therefore that the common law rule invoked by appellants has never been in force in this State. (*Waters v. Moss*, 12 Cal. 538; *Comerford v. Dupuy*, 17 Cal. 308; *Logan v. Gedney*, 38 Cal. 581.) And the authority of these cases was recognized in *Hahn v. Garratt*, 69 Cal. 147, the decision of which, however, was governed by a local law, applicable to Santa Clara County alone.

*I think the judgment should be affirmed.*¹

¹It is generally understood that the common law makes a distinction between the liability of an owner of cattle and of an owner of dogs and cats, because (1) of the difficulty of keeping the latter under restraint, (2) of the slightness of the damage ordinarily caused by their wanderings, (3) of the common usage of allowing them a wider liberty, (4) of their not being so absolutely the chattels of the owner as to be the subject of larceny. (*Read v. Edwards*, 17 C. B. (N. S.) 245; *Churnot v. Lawson*, 43 Wis. 536; *Sanders v. Teape*, 51 L. T. 263, 29 A. L. J. 321; *Buck v. Moore*, 35 Hun, 338; but see *Doyle v. Vance*, 6 Vict. L. R. Cases at Law, 87, *contra*.) In the last cited case, the owner of a trespassing dog, which barked at and frightened plaintiff's horse so that he ran away and broke his neck, was held liable to plaintiff for the value of the horse. Stephen, J., said, "It seems to have been considered, in old times, that there was a marked distinction between trespass by a dog, and trespass by an ox. Now, as a general rule, no such distinction is made. I cannot see why there should be any. This case illustrates how far the law ought to be altered, so as to preserve its accordancy with change of time and place. Of course, the court cannot alter the clearly expressed language of an act of Parliament, though the reason for it may have ceased. And so also as to actual decisions of the courts. If there is reason to alter the law, the Legislature must do it. But on this question, there have been no more than *obiter dicta* based upon reasons which have no longer any existence. At one time, a dog could not be the subject of a theft. The court is at liberty, within reasonable limits, to meet the changed circumstances of the present day."

DEXTER v. COLE.

(6 Wis. 320. — 1858.)

THE plaintiff declared in trespass, charging the defendant with taking and driving away twenty-two sheep, the property of the plaintiff, to his damage one hundred dollars. Plea, general issue. The cause was tried before a justice of the peace, to a jury; when it appeared from the evidence that the defendant, who is a butcher at Milwaukee, was driving some sheep he had purchased toward the city upon the highway, when they became mixed with a small lot of twenty-two sheep of plaintiff, which were running at large upon the highway. The defendant drove the whole flock into a yard near the road, for the purpose of parting them, and did throw out a number which he did not claim, and pursued his way with the remainder to his slaughter-house at Milwaukee, where they were slaughtered in his business. The evidence tended to show, and the jury found it did show, by the verdict rendered, that some four of the plaintiff's sheep remained in the flock, and were driven to Milwaukee, and slaughtered by defendant. The verdict and judgment before the justice were for the plaintiff.

The cause was removed to the county court of Milwaukee County by writ of *certiorari*.

Upon this hearing the county court reversed the judgment of the justice, and rendered a judgment against the plaintiff, before the justice, for costs, to reverse which judgment of the county court this writ of error is brought.

James H. Paine & Son for plaintiff in error.

Butler, Buttrick & Cottrill for defendant in error.

By the court. COLE, J. We have no doubt but the action of trespass would lie in this case. In driving off the sheep, the defendant in error, without doubt, unlawfully interfered with the property of Dexter; and it has been frequently decided that, to maintain trespass *de bonis asportatis*, it was

not necessary to prove actual, forcible dispossession of property, but that evidence of any unlawful interference with, or exercise of acts of ownership over, property, to the exclusion of the owner, would sustain the action. (*Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Met. 27; *Phillips & Brown v. Hall et al.*, 8 Wend. 610; *Morgan v. Varick*, id. 587; *Wintringhouse v. La Foy*, 7 Cowan, 735; *Reynolds v. Shuler*, 5 id. 325; 1 Chitty Pl. (11 Amer. ed.) 170, and cases cited in the notes.) Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake. (2 Green. Ev. sec. 622; *Grulle v. Snow*, 19 J. R. 381.) There is nothing inconsistent with these authorities in the case of *Parker v. Walrod*, 13 Wend. 296, cited upon the brief of the counsel for the defendant in error.¹

* * * * *

The judgment of the county court is therefore reversed, and the judgment of the justice affirmed.

SECTION 3. INJURIES TO REVERSION.

DEVLIN v. SNELLENBURG.

(132 Pa. St. 186. — 1890.)

ON November 3, 1877, John Devlin brought trespass against Joseph Snellenburg, Nathan Snellenburg and others, trading as N. Snellenburg & Co. Issue.

At the trial on April 1, 1889, it was made to appear that the defendants, who were clothiers in the city of Philadelphia, had employed one William D. Johnson to paint their advertisements upon blank walls and other places in the city; that in his employment said Johnson had painted an advertisement for them upon the wall of the property belonging to the plaintiff, which at the time was in the possession of a tenant under a three years' lease, and that the tenant authorized the painting of the sign in consideration of \$6 paid to her by the defendants. Testimony was introduced by both parties as

¹ Cf. *Wellington v. Wentworth*, 8 Met. 548; *Van Valkenburg v. Thayer*, 57 Barb. 196; *Platt v. Tuttle*, 23 Conn. 233.

to the cost of obliterating the advertisement, the necessity of painting it out and of subsequently repainting the wall, etc., and whether the advertisement could be washed out with an application of caustic soda and water.

Mr. Thomas R. Elcock for the appellants.

Mr. James E. Gorman for appellee.

PER CURIAM. If as alleged by the defendants, the wall in question was painted by the consent of the tenants in possession, it might render the latter liable to the plaintiff, but it would not relieve the defendants. If the wall was injured, and the jury have so found, it was an injury to the reversion, and the owner thereof may have his action on the case therefor. (*Ripka v. Sergeant*, 7 W. & S. 9; *Schnable v. Koehler*, 28 Pa. 181; *McIntire v. Coal Co.*, 118 Pa. 108.)

The defendant, Joseph J. Snellenburg, having testified when on the stand that the wall was painted by his order and direction, it was not error for the learned judge to instruct the jury that "no matter what conclusion you come to in the case, the plaintiff is entitled to your verdict."

* * * * *

Judgment affirmed.

SECTION 5. CONVERSION.

PEASE *v.* SMITH.

(61 N. Y. 477. — 1875.)

THE action was brought for the alleged conversion by the defendants of a quantity of law books belonging to the plaintiffs.

Plaintiffs were book-sellers and stationers in the city of Albany. The defendants dealt largely in materials used in the manufacture of paper. Their course of business was to purchase from junk-shops and small dealers rags, old paper, etc., in bales, and to sell to the manufacturers. They bought, among others, from Moses K. Perry, a junk dealer in Albany.

The evidence upon the trial tended to show that among the materials purchased from Perry were law blanks belonging to the plaintiffs, which had been stolen from them by one Frank Mason who was porter in their employ.

Amasa J. Parker for the appellants.

W. Packer Prentice for the respondents.

DWIGHT, C. There are several objections raised by the defendants on this appeal.

1. It is claimed that the judge erred at the trial in refusing to grant a nonsuit, because the defendants bought the goods in controversy in the course of trade, and had sold them before any claim was made by the owners. It is insisted by the appellant that it is a prerequisite to a valid claim for conversion, in such a case, that a demand should have been made for the goods while they were in the defendants' possession and before their sale, and that there can be no conversion, unless control over the property was exercised with knowledge of the plaintiff's rights. This proposition is untenable. The assumed sale by the porter of the plaintiff's to Perry was wholly nugatory, and conveyed no title. (*Saltus v. Everett*, 20 Wend. 267; *McGoldrick v. Willets*, 52 N. Y. 612.) On like grounds, the sale by Perry to the defendants was without effect. They were constructively in possession of the plaintiff's property without the consent of the latter. They even sent their own carts to transfer the goods when sold to Allen Brothers. This exercise of an act of ownership or dominion over the plaintiff's property, assuming to sell and dispose of it as their own, was, within reason and the authorities, an act of conversion to their own use. The assumed act of ownership was *inconsistent* with the dominion of the plaintiffs, and this is of the essence of a conversion. Knowledge and intent on the part of the defendants are not material. So long as the defendants had exercised no act of ownership over the property, and had acted in good faith, a demand and refusal would be necessary to put them in the wrong and to constitute conversion. Until such demand, there is no apparent inconsistency between their possession and the plaintiff's ownership. After a sale has been

made by the defendants, they have assumed to be the owners, and will be estopped to deny in an action by the lawful owner, the natural consequences of their act, and to resist an action for the value of the goods. The principle is well stated by Alderson, B., in *Fouldes v. Willoughby*, 8 M. & W. 540: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times and in all places." In the same spirit, "conversion" is defined, in a very recent case, to be an unauthorized act which deprives another of his property permanently or for an indefinite time. (*Hiort v. Bott*, L. R. (9 Ex.) 86 (A.D. 1874).) So it is said in *Boyce v. Brockway*, 31 N. Y. 490, that a wrongful intent is not an essential element in a conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it. No manual taking, on the defendants' part, is necessary. (*Bristol v. Burt*, 7 J. R. 254; *Connah v. Hall*, 23 Wend. 462.) The case of *Harris v. Saunders*, 2 Strobb. Eq. 370, resembles closely the case at bar. The defendant having the property of the plaintiff in his own hands by purchase from one who had no title, sold it to another who carried it beyond the plaintiff's reach, and received the purchase money. These acts were held to amount to a conversion, though the defendant was not aware of the plaintiff's title. As, according to these views, the conversion took place at the moment of the unauthorized sale by the present defendants, no demand was necessary, the sole object of a demand being to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion. (*Esmay v. Fanning*, 9 Barb. 176; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Glassner v. Wheaton*, 2 id. 352; *Munger v. Hess*, 28 Barb. 75.) After a wrongful taking and carrying away of the property, the cause of action has become complete without further act on the plaintiff's part. (*Brewster v. Silliman*, 38 N. Y. 423; *Hanmer v. Wilsey*, 17 Wend. 91; *Otis v. Jones*, 21 id. 394.)

* * * * *

Judgment affirmed.

SWIM v. WILSON.

(90 Cal. 128. — 1891.)

DE HAVEN, J. The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employee in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defence to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." (*Kimball v. Billings*, 55 Me. 147; *Coles v. Clark*, 3 Cush. 399; *Koch v. Branch*, 44 Mo. 542.) In *Stephens v. Elwall*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord Ellenborough uses this language: "The only question is whether this is a conver-

sion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it." To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who it now appears was a thief, and, relying on his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. (*Barstow v. Mining Co.*, 64 Cal. 388; *Sherwood v. Mining Co.*, 50 Cal. 413.)

The precise question involved here arose in the case of *Bericich v. Marye*, 9 Nev. 312. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defence to an action of trover, to which the present action is analogous." The same conclusion was reached in *Kimball v. Billings*, 55 Me. 147, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defence that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond

payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. . . . The rule of law protecting *bona fide* purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents." Indeed, we discover no difference in principle between the case at bar and that of *Rogers v. Huie*, 1 Cal. 571, in which case, Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel v. Waterman*, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat. In this case it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

McPARTLAND v. READ.

(11 Allen, 231. — 1865.)

TORT, to recover for the conversion of certain articles of household furniture.

At the trial in the Superior Court, before Putnam, J., it appeared that, on the ninth of December, 1863, Samuel B. Cook executed and delivered a mortgage of the articles in controversy to the plaintiff, and to avoid the necessity of recording the mortgage it was proposed by Cook to put the furniture in one room of the house in which he lived, and lock the door, and deliver the key to William D. Whiting, who owned the house, that he might keep possession of the mortgaged property till Cook should pay to the plaintiff the debt secured by the mortgage. This being assented to, was accordingly done; and Cook shortly afterwards moved from the house, and the key of the house was also delivered to Whiting. After this had been done, and before the mortgage had been recorded, the furniture was attached by the defendant Read, who was a deputy sheriff, on a writ against Cook, and was subsequently sold by him on the execution which was obtained in the suit. The other defendant, Foque, acted as the agent of the attaching creditor in directing and assisting in the attachment.

J. Brown for the defendants.

C. I. Reed for the plaintiff.

BIGELOW, Ch. J. These exceptions are groundless. 1. The evidence of delivery of the chattels included in the mortgage, and of the retention of possession of them by the mortgage, was plenary. Delivery to and possession by the agent are the same in legal effect as if made to and held by the principal. The agency was clearly proved.

2. So was the evidence of the conversion of the property. Every tortious taking, with intent to apply chattels to the use of the taker or some other person than the owner, is a conversion.

3. Both defendants were liable. It is not necessary in order to charge them to show that each actually participated in seizing and removing the property. It was sufficient to prove that both were present, one inciting or directing the wrongful taking, and the other obeying the order and carrying it into effect. Both were principals in the conversion.

Exceptions overruled.

SHEA v. MILFORD.

(145 Mass. 525. — 1888.)

W. A. Gile for the plaintiff.

T. G. Kent and *G. T. Dewey* for defendants.

W. ALLEN, J. The property of the plaintiff, alleged to have been converted by the defendants, was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction that, if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property

converted to their own use. (*Farnsworth v. Lowery*, 134 Mass. 512; *Fouldes v. Willoughby*, 8 M. & W. 540; *Heald v. Carey*, 11 C. B. 977.)

It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question.

Exceptions overruled.

FROME v. DEVINS.

(45 N. J. L. 515. — 1883.)

For the plaintiff, *L. De Witt Taylor*.

For the defendant, *George A. Angle*.

DIXON, J. In August, 1879, the plaintiff left his plough on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plough still being there. In June, 1880, the defendant, a neighboring farmer, borrowed the plough of Hibler to plough a field, supposing the plough to be Hibler's, and having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plough which he had used, and demanded of him pay for the use, and the return of the plough or its value, and the defendant, not complying, the plaintiff brought an action of trover for the plough. The justice before whom the suit was instituted, and the Common Pleas on appeal, each gave judgment for the plaintiff for the value of the plough. The judgment of the Pleas is now before us on *certiorari*, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant.

In order to maintain an action of trover, it is necessary to prove a conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by Mr. Justice Depue in *Woodside v. Adams*, 11 Vroom, 417,

in these words: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel."

This subject has quite recently received considerable discussion in the Exchequer Chamber and House of Lords of England, in *Fowler v. Hollins*, L. R. 7 Q. B. 616, and L. R. 7 H. L. 757. The facts upon which the court finally settled as the basis of decision, made the case a plain one of conversion. They were, that one Bayley had fraudulently come into possession of thirteen bales of cotton belonging to plaintiff, and had sold and delivered them to the defendant, who bought in good faith, and who then sold and delivered them in good faith to Micholls & Co. Here was clearly an exercise of dominion over the goods by the defendant inconsistent with the plaintiff's right. But in the course of the cause some of the judges thought that, according to the case reserved, the defendant, in the transfer from Bayley to Micholls & Co., dealt only as broker and agent of the latter, and in examining the goods, receiving them from Bayley and forwarding them to Micholls & Co., acted without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another; and so the question was raised, whether such a possession of the goods and such an asportation amounted, in law, to a conversion. Many of the English cases were commented on at length by Mr. Justice Brett, in both tribunals, and he insisted, with great force and clearness, upon a negative response. Byles, J., and Kelly, C. B., expressly concurred in this opinion, and the other judges in the Exchequer Chamber seem not to have disagreed with it in point of law, but they rested their conclusion upon a different view of the facts. In the House of Lords, Mr. Justice Blackburn expressed his opinion that the defendant was liable, because he both entered into a contract with Bayley, and also assisted in changing the custody of the goods, and so knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls & Co., that they might dispose of them as their own. This he deemed a conversion by the defendant, no matter whether he acted as

broker or not. In the course of his remarks he lays down the principle that one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused from what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or entrusted with their custody. He concedes, moreover, that this is not the extreme limit of the excuse, and doubts whether it would be a conversion for a miller to grind grain into flour and return the flour to the person who brought the grain, before he heard of the owner. Under the definition of Mr. Justice Depue, above quoted, this act of the miller would be a conversion, because it changed the quality of the owner's goods. Mr. Baron Cleasby, while concurring with those who looked upon the defendant as a principal, and therefore guilty, says with reference to this view, that he was a broker merely: "How far the intermeddling with the goods themselves by delivering them would" involve a broker in responsibility to the owner, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in such case could be regarded as having an independent possession of the goods and delivering them for the purpose of passing the property." Mr. Justice Grove advised the house in favor of the plaintiff, on the ground that the defendant intermeddled with goods which were not his own, and exercised a dominion over them inconsistent with the right of the true owner. Mr. Baron Amphlett concurred with Brett; Lord Chelmsford, Chancellor Cairns, Lords Hatherley and O'Hagan advised for the plaintiff in substance, because the defendant had exercised dominion over the plaintiff's property by disposing of it to Micholls & Co.

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, *i.e.* ownership over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged.

In the very late case in Massachusetts (*Spooner v. Manchester*, 133 Mass. 270) a similar view is expressed. Field, J., there says: "Conversion is based upon the idea of an assumption of property or a right of dominion over the thing converted, . . . and it is, therefore, not every wrongful intermeddling with, or wrongful asportation, or wrongful detention of personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not, in themselves, imply an assertion of title or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it. . . . Whether an act involving the temporary use, control or detention of property, implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property."

To the same effect is *Laverty v. Snethen*, 68 N. Y. 522. In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plough. He received it for a temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion.

This being so, his subsequent failure to deliver the plough to

the plaintiff on demand, was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not refuse to deliver, but could not. (*Ross v. Johnson*, 5 Burr. 2825; *Salt Springs Bank v. Wheeler*, 48 N. Y. 492; *Magnin v. Dinsmore*, 70 N. Y. 410.)

The plaintiff contends that the evidence on the part of the defendant as to his conversation with Hibler, at the time of borrowing the plough, was illegal. It was not, however. It being proper to show that the defendant came into possession of the plough, the declarations of himself and of the person from whom he received possession, contemporaneous with the transfer and indicative of its character, were admissible as part of the *res gestæ*. (*Luse v. Jones*, 10 Vroom, 707; *Hunter v. State*, 11 Vroom, 495.)

*The judgment below should be reversed.*¹

GURLEY v. ARMSTEAD.

(148 Mass. 267. — 1889.)

TORT, for the conversion of certain articles of personal property belonging to the plaintiff. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, which, so far as material, appears in the opinion.

B. B. Jones for the plaintiff.

W. H. Moody for the defendant.

DEVENS, J. The defendant, who was a job teamster, removed the goods alleged to have been by him converted from a room in the dwelling house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for stor-

¹ Cf. *Roach v. Turk*, 9 Heisk. (Tenn.) 708, with *Hollis v. Fowler*, *supra*.

age, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ignorance of the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. (*Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 3 Met. 6.) And this would be so apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner. (*Loring v. Mulcahy*, 3 Allen, 575; *Metcalf v. McLaughlin*, 122 Mass. 84.)

Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle upon which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing the goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected, because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession.

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally

refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. (*Buckland v. Adams Express Co.*, 97 Mass. 124; *Judson v. Western Railroad*, 6 Allen, 486.) His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well-established authority would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal.

If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

Judgment for the defendant.

WILSON v. McLAUGHLIN.

(107 Mass. 587. — 1871.)

H. B. Staples (*F. P. Goulding* with him) for the plaintiff.

J. S. Abbott for the defendant.

AMES, J. 1. It appears that, when the horse was taken up, he was going at large in the highway, and was supposed to be about to enter upon the premises of the defendant's employer. Under such circumstances, the act of turning him into an enclosed pasture was not an interference with the owner's possession, or a conversion of the horse to the defendant's own use. Nothing is shown at all inconsistent with a purpose on the defendant's part to keep the horse for the owner; and it has been decided that the finder of an estray may keep it for the owner, and is not liable in trover unless he uses the estray, or refuses to deliver it on demand. (*Nelson v. Merriam*, 4 Pick. 249.) We do not understand the plaintiff to complain of this act, except on the ground that the defendant afterwards violated his trust as a voluntary bailee by turning the horse into the highway again. But this, it appears to us, was the act of his employer, and not of himself. He could not keep the horse on another man's land, against the will of such other man. The turning out into the highway was therefore an act which he could not prevent, and for which he cannot be held responsible; and the plaintiff has no cause of action under this first count.

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Exceptions overruled.

DAMAGES IN TROVER.

WRIGHT v. BANK OF THE METROPOLIS.

(110 N. Y. 237. — 1888.)

W. E. Scripture for plaintiff.

John Delahunty and *Joseph H. Choate* for defendant.

PECKHAM, J. This case comes before us in a somewhat peculiar condition. As both parties appeal from the same judgment, which is for a sum of money only, it would seem as if there ought not to be much difficulty in obtaining its reversal. It is obvious, however, that a mere reversal would do neither party any good, as the case would then go down for a new

trial, leaving the important legal question in the case not passed upon by this court. This, we think, would be an injustice to both sides. The case is here, and the main question is in regard to the rule of damages, and we think it ought to be decided. By this charge the case was left to the jury to give the highest price the stock could have been sold for intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule is claimed under *Romaine v. Van Allen*, 26 N. Y. 309, and several other cases of a somewhat similar nature referred to therein. *Markham v. Jaudon*, 41 N. Y. 235, followed the rule laid down in *Romaine v. Van Allen*. In these two cases a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the *Markham Case* the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making any difference in the rule of damages, and the case was thought to be controlled by that of *Romaine*.

In this state of the rule the case of *Matthews v. Coe*, 49 N. Y. 57-62, came before the court. The precise question was not therein involved, but the court (per Church, Ch. J.) took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances, and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond the reach of review whenever an occasion should render it necessary. One phase of the question again came before this court, and in proper form, in *Baker v. Drake*, 53 N. Y. 211, where the plaintiff had paid but a small percentage on the value of the stock, and his broker, the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in *Markham v. Jaudon*, *supra*, and that case

was cited as authority for the decision of the court below. This court, however, reversed the judgment and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, Rapallo, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of the judgment.

In the course of his opinion the judge said that the rule of damages, as laid down by the trial court, following the case of *Markham v. Jaudon*, had "been recognized and adopted in several late adjudications in this State in actions for the conversion of property for fluctuating value; but its soundness, as a general rule applicable to all cases of conversion of such property, has been seriously questioned and is denied in various adjudications in this and other States." The rule was not regarded as one of those settled principles in the law, as to the measure of damages to which the maxim *stare decisis* should be applied. The principle upon which the case was decided rested upon the fundamental theory that in all cases of the conversion of property (except where punitive damages are allowed) the rule to be adopted should be one which affords the plaintiff a just indemnity for the loss he has sustained by the sale of the stock; and in cases where a loss of profits is claimed it should be, when awarded at all, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted.

The rule thus stated, in the language of Judge Rapallo, he proceeds to apply to the facts of the case before him. In stating what, in his view, would be a proper indemnity to the injured party in such a case, the learned judge commenced his statement with the fact that the plaintiff did not hold the stocks for investment, and he added that if "they had been paid for and owned by the plaintiff different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker and not of the customer. If the broker has violated his contract,

or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done."

The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or, in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendants was illegal and a conversion, and that plaintiff had a right to disaffirm the sale and require defendants to replace the stock. If they failed then the learned judge says the plaintiff's remedy was to do it himself, and to charge the defendants with the loss necessarily sustained by him in doing so. Is not this equally the duty of a plaintiff who owns the whole of the stock that has been wrongfully sold? I mean, of course, to exclude all question of punitive damages resting on bad faith. In the one case the plaintiff has a valid contract with the broker to hold the stock, and the broker violates it and sells the stock. The duty of the broker is to replace it at once upon the demand of the plaintiff. In case he does not it is the duty of the plaintiff to repurchase it. Why should not the same duty rest upon a plaintiff who has paid in full for his stock and has deposited it with another conditionally? The broker who purchased it on a margin for the plaintiff violates his contract and his duty when he wrongfully sells the stock just as much as if the whole purchase price had been paid by the plaintiff. His duty is in each case to replace the stock upon demand, and in case he fails so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty, it seems to me, is founded upon the general duty which one owes to another, who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within his power to do. It is well said by Earl, J., in *Parsons v. Sutton*, 66 N. Y. 92, that "the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not by inattention, want of care

or inexcusable negligence, permit his damage to grow, and then charge it all to the other party. The law gives him all the redress he should have by indemnifying him for the damage which he necessarily sustains." (See, also, *Dillon v. Anderson*, 43 N. Y. 231; *Hogle v. New York Central & Hudson River Railroad Company*, 28 Hun, 363, the latter case being an action of tort.) In such a case as this, whether the action sounds in tort, or is based altogether upon contract, the rule of damages is the same. (Per Denio, Ch. J., in *Scott v. Rogers*, 31 N. Y. 676; and per Rapallo, J., in *Baker v. Drake*, *supra*.) The rule of damages as laid down in *Baker v. Drake*, in cases where the stock was purchased by the broker on a margin for plaintiff, and where the matter was evidently a speculation, has been affirmed in the later cases in this court. (*Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368.) In both cases the duty of the plaintiff to repurchase the stock within a reasonable time is stated. I think the duty exists in the same degree where the plaintiff had paid in full for the stock and was the absolute owner thereof. In *Baker v. Drake* the learned judge did not assume to declare that in a case where the pledgor was the absolute owner of the stock, and it was wrongfully sold, the measure of damages must be as laid down in the *Romaine Case*. He was endeavoring to distinguish the cases, and to show that there was a difference between the case of one who is engaged in a speculation with what is substantially the money of another and the case of an absolute owner of stock which is sold wrongfully by the pledgee. And he said that at least the former ought not to be allowed such a rule of damages. It can be seen, however, that the judge was not satisfied with the rule in the *Romaine Case*, even as applied to the facts therein stated. In his opinion he makes use of this language: "In a case where the loss of probable profits is claimed as an element of damage, *if it be ever allowable to mulct a defendant for such a conjectural loss*, its amount is a question of fact, and a finding in regard to it should be based upon some evidence." In order to refuse to the plaintiff in that case, however, damages claimed, it was necessary to overrule the *Markham Case*, which was done.

Now so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrong-doer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases, and that measure is the amount which, in the language of Rapallo, J., is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial, would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation, for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall only be such as a proper degree of prudence on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

It is said that, as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests

upon the ground that he has converted, though in good faith and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damages as light as he reasonably may, rests upon him in both cases, for there is no more legal wrong done by the defendant in selling the stock, which the plaintiff had fully paid for, than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time, does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time or prosecuted with reasonable diligence, and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial, and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to presume, in favor of an investor, that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption, I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be prompted by adhering to the rule which imposes the

duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming of course, in all cases, that there was good faith on the part of the defendant.

It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before the trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law. (*Colt v. Owens*, 90 N. Y. 368; *Hedges v. H. R. Railroad Co.*, 49 id. 223.)

We think that beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the ninth of May of the same year. The highest price which the stock reached during that period was \$2795, and as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price reached in that time. From this should be deducted the amount of the check and interest to the day when the stock was sold, as then it is presumed the defendant paid the check with the proceeds of the sale.

In all this discussion as to the rule of damages, we have assumed that the defendant acted in good faith, in an honest mistake as to its right to sell the stock, and that it was not a case for punitive damages. A careful perusal of the whole case leads us to this conclusion. It is not needful to state the evidence, but we cannot see any question in the case showing bad faith, or indeed any reason for its existence. The fact is uncontradicted that the defendant sold the stock upon what its officers supposed was the authority of the owner thereof given to them by Elliott.

The opinion delivered by the learned judge at General Term, while agreeing with the principle of this opinion as to the rule of damages in this case, sustained the verdict of the jury upon the theory that if the plaintiff had gone into the market within a reasonable time and purchased an equivalent

of the stocks converted, he would have paid the price which he recovered by the verdict. This left the jury the right to fix what was a reasonable time and then assume there was evidence to support the verdict. In truth there was no evidence which showed the value of the stock to have been anything like the amount of the verdict, for the evidence showed it was generally very much less, and sometimes very much more. But fixing what is a reasonable time ourselves, it is seen that the stock within that time was never of any such value.

The judgment should be reversed and a new trial granted, with costs to abide the event.

*Judgment reversed.*¹

All concur, except RUGER, Ch. J.; ANDREWS and DANFORTH, JJ., dissenting.

SECTION 6. TENANTS IN COMMON.

CARR v. DODGE.

(40 N. H. 403. — 1860.)

C. R. Morrison, D. Steele and H. Foster for the plaintiff.

Clark & Smith, and Morrison & Stanley for the defendant.

NESMITH, J. The first question presented for consideration in this case is, Can the plaintiff recover, in this form of action, that portion of the income of the farm for the year 1854 which remained as undivided common stock at the time of the decease of his testator, James Dodge, on the 10th of January, 1855, the commissioner estimating the value of this property at \$154.08?

We suppose it to be well settled that the relation established by law between the owners of this property, at the time of the death of the father, was that of tenants in common. Upon this point the authorities appear to be decisive.

* * * * *

¹ Followed in *Gallagher v. Jones*, 129 U. S. 193; 9 Sup. Ct. R. 335.

One who has converted property may of right return it, and thus reduce damages. Bishop on Non Contract Law, § 401. *Contra*, Cooley on Torts, 535 (2d. ed.).

The relation of the parties being thus established by law to the income of the farm for the year 1854, the next question is, Can this form of action be maintained? The ordinary presumption of law is, that a sole possession by one tenant in common is held in the right of both tenants. (*Buckmaster v. Needham*, 22 Vt. 617.) "One tenant in common in possession is not liable in trover, by his co-tenant, for his portion of the crops grown upon the land." (*Kersel v. Earnest*, 21 Penn. 58; *Moore v. Bunker*, 29 N. H. 420.) In an action to recover damages for the conversion of a chattel, if the plaintiff be the several owner, he would be entitled to recover upon the proof of the demand and refusal; but if his interest be joint, and had never been separated, he could not recover against a co-owner, without proving also that the conversion went to the destruction of the chattel, or the entire exclusion of his right. (*Allen v. Harper*, 26 Ala. 126; *Kennison v. Hum*, 29 N. H. 501.) The plaintiff will recover, when the joint owner has taken the whole property from him by action of replevin. (3 Kern. 173.) "One tenant in common cannot maintain trover against his co-tenant of the same chattel for any act less than the destruction of his interest therein." (*Hurd v. Darling*, 14 Vt. 214.) "But a sale of a chattel by a co-tenant shows a kind of dominion unjustifiable and inconsistent with the rights of the parties." (Hill on Sales; *Mumford v. McKay*, 8 Wend. 444, 403; *Weld v. Oliver*, 21 Pick. 559; *Wilson v. Reed*, 3 Johns. 174; *Blake v. Mulliken*, 14 N. H. 213.)

This case does not find such a conversion as the law contemplates should exist, in order to entitle the plaintiff to recover any portion of the crops or income of the farm for 1854, by the action of trover; and therefore the sum of \$154.08, or the claim to this amount of crops, must be disallowed, and cannot be recovered in this action.¹

* * * * *

¹ Where the property is easily susceptible of exact division, refusal by a co-tenant to sever is a conversion. (*Stall v. Wilbur*, 77 N. Y. 158; *Balch v. Jones*, 61 Cal. 234.) But this rule does not apply where one has a mere right to have a part of a larger mass set out to him, but no title. (*Morrison v. Dingley*, 63 Me. 553.)

SECTION 7. RIGHTS OF POSSESSORS.

WHEELER v. LAWSON.

(103 N. Y. 40. — 1886.)

Spencer Clinton for appellants.*Adelbert Moot* for respondent.

DANFORTH, J. Upon these facts this appeal should succeed. The plaintiffs were in actual possession of the property when the defendant, against their will, forcibly seized, removed and sold it. This was enough without any other evidence of title to maintain the action (*Stowell v. Otis*, 71 N. Y. 36), except against the true owner, or one connecting himself in some way with the true owner. The general denial does not avail the defendant, for justification is not admissible under it. The only defence is in the affirmative answer, which sets up that the property seized belonged to Shoemaker, or Levi Allen as his assignee. So far as this answer merely shows title out of the plaintiffs, it is of no consequence. If the title was in fact in Allen, the defendant does not connect himself with it. He must, therefore, rely on showing title in Shoemaker, against whose property only he has execution. This he does not do. On the contrary the answer asserts that Allen, as assignee of the goods, etc., of Shoemaker, is a necessary party to the action, but no steps appear to have been taken to bring him in, in accordance with this averment. The referee in substance finds that on the 20th of July, 1880, and before the judgment against him was obtained, Shoemaker executed a general assignment of all his property, including that in question, to all for the benefit of his creditors, and by necessary implication also finds that on that day he delivered possession of it to his assignee, for he says Shoemaker continued in possession until he executed the assignment. The assignee is not a party to the suit, and the defendant's justification fails because he shows that the title is in Allen, against whom he has no claim. It is conceded that if the judgment creditor were seeking to secure the avails of the mortgaged property by proceedings in the nature

of a creditor's bill, and did not attack the assignment as well as the mortgage, then it would not be entitled to relief, because a judgment setting aside the incumbrance by mortgage would not afford the bank any relief, as the property or the avails of it would belong to the assignee, and so it was held by us in *Spring v. Short*, 90 N. Y. 538. The form of the action is immaterial where the same facts appear. Here they do. The respondent argues that showing title in Allen will not enable the plaintiffs to sustain the action without that title has been transferred to them. Doubtless that is so. They did not need to show it. Possession was enough, *prima facie*, to sustain the action, but it does appear, however, that possession was taken by Allen's permission. Besides, as the goods when seized by the defendant were in the actual possession of the plaintiffs, the burden was upon the defendant either to prove title in Shoemaker, or to connect himself with Allen's title, and show that the taking was by his authority, or by virtue of process or right acquired through legal proceedings against him. (*Merritt v. Lyon*, 3 Barb. 110; *Demick v. Chapman*, 11 Johns. 132; *Hurd v. West*, 7 Cow. 752.) Neither of these things was accomplished. No invalidity is found as to the assignment, nor any unwillingness on the part of the assignee to perform his duty under it. He stands, not a mere representative of the debtor, but of the rights of creditors, and may impeach the assignor's conveyances, although the debtor could not do so. (Laws of 1858, c. 314.) So also as the title to the property passed to Allen by the assignment, he could doubtless, as the defendant's counsel says, maintain his action in trover. He could do so because he was the general owner. But so also could the plaintiffs, because their possession was, upon the finding of the referee, by the permission of the assignee. They had thus a special property or interest in the articles, and a recovery by either would be a bar to an action by the other. But it is enough to defeat the justification set up in this action that at the time the defendant levied, the judgment and execution debtor had no right or interest in the property, it having passed from him by the prior assignment to Allen; and as this was before judgment, so it was of course before execution issued, and the goods were neither actually or constructively

bound by it. (2 R. S. 365, sec. 13; Code, sec. 1405.) It is, therefore, unnecessary to consider other questions raised by the appellants, or anticipate how they may stand upon another trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, except FINCH, J., dissenting, ANDREWS, J., not voting, and MILLER, J., absent.

SECTION 9. TRESPASS AB INITIO.

ADAMS v. RIVERS.

(11 Barb. 390. — 1851.)

H. Adams, appellant in person.

Mitchell & Ely for the respondent.

By the court. WILLARD, P. J.

* * * * *

The plaintiff proved, *prima facie*, that he owned and possessed both the lots mentioned in the complaint. These lots, being bounded by public streets, extended to the centre of the street. This is undoubtedly the legal presumption. . . . As was well remarked by Justice Cowen in *Pearsall v. Post*, 20 Wend. 121, the relative rights both of owner and passenger in a highway, are well understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman cannot stop to graze his steed without being a trespasser; it is only in case of inevitable, or at least accidental detention, that he can be excused even in halting for a moment.

This brings us to the main question in the case, whether the defendant, by using abusive and insulting language to the plaintiff, became a trespasser from the beginning. The testimony authorized the jury to find that the defendant came on to the premises of the plaintiff, covered by the street, not in

the legitimate use of the highway as a place of travel, but for the express purpose of abusing him.

* * * * *

The defendant committed a trespass while standing on the sidewalk by the plaintiff's lot where he lived, and using towards him abusive language. While so engaged he was not using the highway for the purpose for which it was designed, but was a trespasser. He stood there but about five minutes. It was not shown that he stopped on the sidewalk for a justifiable cause; on the contrary, it was rendered probable that it was for a base and wicked purpose. It was, therefore, a trespass. Suppose a strolling musician stops in front of a gentleman's house, and plays a tune or sings an obscene song under his window, can there be a doubt that he is liable in trespass? The tendency of the act is to disturb the peace, to draw together a crowd, and to obstruct the street. It would be no justification that the act was done in a public street. The public have no need of the highway but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights they possessed before the highway was made. They can protect themselves against such annoyances by treating the intruders as trespassers.

The action therefore was strictly supported by the evidence. The jury were not limited to mere compensatory damages, and the court could not have interfered had the recovery been five times as much as it was. (*Merest v. Harvey*, 5 Taunt. 442; *Cook v. Ellis*, 6 Hill, 465; *Hitchcock v. Whitney*, 4 Denio, 461.)

The judgment of the county court must be reversed and that of the justice affirmed.

¹ *Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142, 47 A. L. J. 329.

REMEDIES.

AVERILL v. CHADWICK.

(153 Mass. 171. — 1891.)

DEVENS, J. We have no occasion to consider whether the rabbits for the conversion of which this action was brought were unlawfully exposed for sale in violation of Pub. St. c. 91, and Acts 1886, c. 276, § 5, nor whether, upon proper proceedings had, they might have been adjudicated to be forfeited. Without so deciding, we assume these positions in favor of the defendant's contentions. His own statement, which, in the present posture of the case, must be taken as correct, does not show him to have been either a constable or police officer, even if these officers could have made a seizure of the property without a warrant, which, again, we do not intend to decide. He was a deputy of the board of inland fisheries and game commissioners, who states that he had orders from them to seize and remove whatever of this nature was offered for sale unlawfully. He did not pretend that he had orders from any court, or any warrant, but took the rabbits to destroy them. It is quite clear that neither the commissioners nor their deputy could, without power, seize, remove, and destroy property, even though the same was unlawfully exposed for sale. No right to do this is given by the statute, nor is any authority cited to us which justifies it.

Even if the taking of the rabbits was unlawful, yet, the possession of them being illegal, it is the contention of the defendant that the plaintiff cannot avail himself of this illegal possession to maintain the action. In *Com. v. Rourke*, 10 Cush. 397, it is held to be well established at common law that property unlawfully acquired may nevertheless be the subject of larceny, and it is said "that even he who larceniously takes the stolen object from a thief whose hands have but just closed upon it may himself be convicted therefor in spite of the criminality of the possession of his immediate predecessor in crime." In *Com. v. Coffee*, 9 Gray, 139, where the article stolen was intoxicating liq-

uor purchased in violation of the statute of Massachusetts, and intended to be sold in violation of the act, it was held to be the subject of larceny. Even, therefore, if, as we have assumed, in the case at bar, the defendant might have forfeited and lost his property if it had been seized upon proper legal process, and it had appeared that it was kept for an illegal purpose, he was only to be deprived of it upon such proof and by the methods which the law points out. In the plaintiff's hands the rabbits were strict property, even if unlawfully kept for sale. If deprived of them by a wrongful seizure, the party taking them should be made responsible to him for their value. . . .

Exceptions overruled.

MILLER v. HYDE.

(161 Mass. 472. — 1894.)

REPLEVIN of horse converted by Geo. Bryden, Nov. 13, 1890, and sold by him March 31, 1891, to J. C. Davenport and A. L. Hyde. In November, 1891, plaintiff brought trover in Connecticut for the horse against Bryden, Davenport, Hyde and John Shillinglaw, the horse then being in the possession of the last three defendants. Judgment was recovered against Bryden, but not against the other defendants, as they had nothing to do with the horse until some months after Bryden's conversion of it. The horse had been attached at the commencement of the suit, and execution on the judgment was levied on it, but it was replevied in Connecticut by Davenport, who intrusted it to E. A. Hyde by whom it was taken to Massachusetts, and against whom the present replevin suit was brought. The Connecticut replevin suit had not been determined when this was commenced; Bryden was worthless and the judgment against him by plaintiff remained wholly unsatisfied. The trial court ordered judgment for the defendant.

BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her

husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee who had wrongfully usurped dominion and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the courts of that State, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that, in early times, title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction. See *Atwater v. Tupper*, 45 Conn. 144; *Turner v. Brock*, 6 Heisk. 50; *Lovejoy v. Murray*, 3 Wall. 1; *Ex parte Drake*, 5 Ch. Div. 866; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533, and note. And the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law. Whenever the title passes, as there has been no sale or gift and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrongdoer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the

chattel, and although the writ might contain a *capias*; because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that, without some actual satisfaction, the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and, until pursued so far that it has given actual satisfaction, ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and quoted in *Vanuxem v. Burr*, 151 Mass. 386, 389, as approved in *Lord v. Bigelow*, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can, without a fresh taking, maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide. (See *Bannett v. Hood*, 1 Allen, 47; *Trask v. Railroad Co.*, 2 Allen, 331; *Bliss v. Railroad Co.*, 160 Mass. 447.) If he is so restricted, it is not because the ownership of the chattel has been transferred. But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached as property of Bryden, and, since

obtaining judgment, she has caused the horse to be seized in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same parties. (*White v. Dolliver*, 113 Mass. 400; *Newell v. Newton*, 10 Pick. 470.) But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortgagee of personalty who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his own property as he may choose, merely procuring it to be attached on mesne process, or seized on execution as the property of another, does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct there usually is, as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall for a special purpose only be treated as the property of another. This is "consistent with an intention ultimately to assert title should circumstances render it desirable for him so to do;" and he may well wait to see an issue, which may be such as to avoid the litigation of the question of title. (See *Edmunds v. Hill*, 133 Mass. 445, 446; *Bursley v. Hamilton*, 15 Pick. 40, 43; *Johns v. Church*, 12 Pick. 557; *Mackay v. Holland*, 4 Metc. 69, 74; *Dewey v. Field*, 4 Met. 381, 384.) Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to divest him of his ownership when it would not have that effect in other forms of action. In trover he is in legal effect asserting by his suit that the title is and will remain in himself until he

receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property, which does not divest him of title, or hamper him in the subsequent assertion of his ownership except by the rules of estoppel. The case of *Ex parte Drake*, above cited, is an authority to the point that a plaintiff who has brought an action of detinue, and taken judgment both for the detention and the value of the chattel, and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel in specie. In such cases courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress. In the present case, Davenport had bought the horse of Bryden before the attachment was made, and therefore the attachment was a denial of his ownership as well as an assertion of her own title by the plaintiff. The natural construction to be put upon her conduct in attaching and beginning a levy upon her own horse as the property of Bryden in a suit asserting her ownership is that, while she contended that in fact the horse was her own, she consented that, if litigation with Davenport as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless barred by the rules of estoppel. (It appearing that neither Davenport nor defendant Hyde had changed his position or conduct in reliance on plaintiff's action in levying the attachment or execution, it was held there was no estoppel and judgment was ordered for the plaintiff.)

HOLMES, J. As the judges are not unanimous, it becomes necessary for me to state my views, which otherwise I should not do, as they have not persuaded my brethren.

I am of opinion that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It has always seemed to me that one whose property has been converted has an election between two courses, — that he may have the thing back, or he may have its value in damages, but that he cannot have both; that when he chooses one he necessarily gives up the other; and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing, at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the thing. Usually, estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general, an election is determined by judgment. (*Butler v. Hildreth*, 5 Metc. 49; *Bailey v. Hervey*, 135 Mass. 172, 174; *Vulcanite Co. v. Caduc*, 144 Mass. 85, 86; *Raphael v. Reinstein*, 154 Mass. 178, 179.) I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not for one giving nominal damages for the taking. The argument from election is adopted in *White v. Philbrick*, 5 Greenl. 147, 150, which, so far as I know, is still the law of Maine, notwithstanding the remark in *Murray v. Lovejoy*, 2 Clif. 191, 198. See, also, Shaw, C. J., in *Butler v. Hildreth*, 5 Metc. 49, 53.

The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the *dictum* in Jenk. 4th Cent., Case 88, *Solutio pretii emptionis loco habetur*, which is dogma, not reasoning, or, if reasoning, is based on the false analogy of a sale. But they leave the argument which I have stated unanswered, not, as I think, because the judges deemed

it unworthy of answer, or met by paramount considerations of policy, but because they did not have either that, or a clue to the early cases, before their mind. (*Lovejoy v. Murray*, 3 Wall. 1, 17; *Brinsmead v. Harrison*, L. R. 6 C. P. 584, 587, L. R. 7 C. P. 547, 554.) It is not the practice of the English judges to overrule the common law because they disprove it, and to do so without discussion. In *Brinsmead v. Harrison*, Mr. Justice Willes thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility — it is only the possibility — of an election turning out to have been unwise is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right.

That the view which I hold is the view of the common law, I think, may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Y. B. 19 Hen. VI. 65, pl. 5, Newton says: "If you had taken my chattels, it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not." In 6 Hen. VII. 8, pl. 4, Vavisor uses similar language, and adds: "And so it is of goods taken. One may divest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue," if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff, and trespass disaffirms it, and that the plaintiff has election. (Bro. Abr. Trespass, pl. 134; 18 Vin. Abr. 69 (E); Anderson and Warberton, JJ., in *Bishop v. Montague*, Cro. Eliz. 824.) The proposition is made clearer when it is remembered that a tortious possession — at least, if not felonious — carried with it a title by wrong, in the case of chattels, as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland. (3 Harv. Law Rev. 23, 326; 1 L. Q. Rev. 324.)

I do not regard that as a necessary doctrine, or as the law of Massachusetts; but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and, on the same principle, trover, proceed on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so, if it does not yet belong to the defendant?

I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff, after judgment, were to retake the chattel by his own act. It would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet, on the view which I oppose, I presume that the judgment could not be collected. (See *Coombe v. Sansom*, 1 Dowl. & R. 201.)

It seems to me that the opinion which I hold was the prevailing one in England until *Brinsmead v. Harrison*. (*Bishop v. Montague*, Cro. Eliz. 824; Fenner, J., in *Brown v. Wootton*, Cro. Jac. 73, 74, Yel. 67, Moore, 762; *Adams v. Broughton*, 2 Strange, 1078, Andrews, 18, 19; *Buckland v. Johnson*, 15 C. B. 145, 157, 162, 163; Sergeant James Manning's note to *Barnett v. Branado*, 6 Man. & G. 640; see *Lamine v. Dorrell*, 2 Ld. Raym, 1216, 1217.) And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. (*Hepburn v. Sewell*, 5 Har. & J. 211; *Smith v. Smith*, 51 N. H. 571 and 50 N. H. 212. Compare *Atwater v. Tupper*, 45 Conn. 144, 148.)

The only authorities binding upon us are the ancient evidences of the common law, as it was before the Revolution, and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to

be decided in accordance with it. (*Campbell v. Phelps*, 1 Pick. 62, 65, 70; *Bennett v. Hood*, 1 Allen, 47.) Many cases in other States are collected in *Freem. Judgm.* (4th ed.) § 237.

If I am right in my general views, they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there; but the horse was there, and she was entitled to it there, so that her judgment recovered there passed the title. Like any other transfer of a chattel, valid in the place where it was made, and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law.

(A dissenting opinion was read by KNOWLTON, J., in which the Chief Justice concurred.)

ROBBINS v. SWIFT.

(86 Me. 197: 29 At. 981. — 1894.)

EMERY, J. The defendant was a town collector of taxes and, as such, had a legal warrant to collect a legal tax from the plaintiff. After observing the necessary preliminaries the defendant arrested the plaintiff on the tax warrant, for nonpayment of the tax, and committed him to the county jail. In the written certificate of the costs of arresting and committing, given to the jailer as required by statute, the defendant named a sum in gross, and in excess of the amount of the legal fees. The plaintiff, after the commitment, paid the full sum thus certified, and was thereupon released from the imprisonment.

It does not appear in the case that the plaintiff questioned the legality of the sum certified, or that his imprisonment was at all prolonged by the excess of costs certified, or would have been in the least abridged, had they been correctly certified.

The plaintiff has now brought this action of trespass for that arrest and imprisonment. At the trial the defendant conceded

that he had injured the plaintiff by demanding and taking excessive fees, as above described, but contended that this action of trespass was not the lawful remedy for such an injury. The presiding justice sustained this contention, and thus practically directed a verdict for the defendant. The plaintiff excepted. The question, therefore, is whether trespass is the proper form of action for this injury.

It is the firmly established rule of our law that any abuse by a ministerial officer of an authority given him by law is remediable by an action of trespass. The reasons for this salutary rule are clearly and correctly stated in *Carter v. Allen*, 59 Me. 296, and lately affirmed in *Railroad Co. v. Small*, 85 Me. 462, and need not be repeated here. In accordance with this rule, the following acts have been held to be abuses of authority, and remediable by an action of trespass: The working an estray or a beast distrained. *Bagshawe v. Goward*, Cro. Jac. 147 (cited in *Gibbs v. Chase*, 10 Mass. 129). The omission to case for impounded beasts. *Adams v. Adams*, 13 Pick. 384. The placing an unfit person in a house as keeper over goods attached. *Malcolm v. Spoor*, 12 Metc. (Mass.) 279. Selling attached property when one of the appraisers was interested. *McGough v. Wellington*, 6 Allen, 505. A delay for five hours to remove goods from the room in which they had been attached. *Williams v. Powell*, 101 Mass. 467. The omission of a collector of taxes, after a sale of property, to "render an account in writing" of the sale and charges. *Blanchard v. Dow*, 32 Me. 557. Selling the goods of a firm on an execution against one partner. *Moore v. Pennell*, 52 Me. 162. The deduction of illegal fees by a tax collector from the proceeds of a tax sale. *Carter v. Allen*, 59 Me. 296. The selling by a tax collector of more goods than necessary to pay the tax and expenses of sale, although the surplus proceeds were paid over to the plaintiff. *Seekins v. Goodale*, 61 Me. 400. The omission by the officer attaching hay to leave enough hay for the debtor's cattle. *Wentworth v. Sawyer*, 76 Me. 434.

The foregoing cases sufficiently illustrate the rule. Was the defendant's act within the rule? Of this there can be little, if any, doubt. He practically demanded and exacted excessive and illegal fees of a prisoner whom he held in official durance.

He presumably knew the law, and what were the legal fees. He thus abused his official power, and under the rule above stated this abuse can be remedied in this action of trespass.

It is urged that the imprisonment does not appear to have been prolonged a single instant by reason of the demand for illegal fees, and that, therefore, the plaintiff's only action is one to recover back the sum wrongfully demanded. The same contention was urged in *Carter v. Allen*, *supra*, and overruled. In determining whether an act is an abuse of official power, the nature of the act itself is to be looked at, rather than its mere result. The defendant's act was clearly illegal, and an abuse of official power. That the plaintiff did not resist or question it does not make it any the less illegal or abusive. The sharp stress of imprisonment does not encourage a prisoner to question the propriety of official demands made upon him as a condition of his liberty. That he hastens to comply with the illegal demand, rather than suffer further imprisonment, does not purge the demand of its oppressive character as an abuse of official power. . . .

Exceptions sustained.

CHAPTER X.

WHAT AMOUNTS TO NUISANCE?

BOHAN v. P. J. G. L. Co.

(122 N. Y. 18. — 1890.)

Lewis E. Carr for appellant.*John W. Lyon* for respondent.

BROWN, J. The plaintiff made no complaint of the existence of a nuisance upon defendant's property prior to 1880, when defendant first introduced the use of naphtha in the manufacture of its gas, and it was a disputed question on the trial, upon which there was a strong conflict of testimony, whether the smells from the defendant's works, after it began to use naphtha, were more offensive than when it used coal.

This question, it must be assumed, the jury determined in favor of the plaintiff's contention.

The court charged the jury that, to constitute a nuisance, it was essential that the smells and odors from the defendant's works should be sufficient "to contaminate and pollute the air and substantially interfere with the plaintiff's enjoyment of her property," and that the question for them to determine was, "Did the odor pollute the air so as to substantially render plaintiff's property unfit for comfortable enjoyment?" An exception was taken by the defendant to this part of the charge.

The rule stated by the learned judge was in accordance with all the authorities. If one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages, and it is not necessary to a right of action that the owner should be driven from his dwell-

ing; it is enough that the enjoyment of life and property be rendered uncomfortable. (*Rex v. White*, 1 Burr. 337; *S. H. S. Co. v. Tipping*, 11 H. L. Cas. 642; *Fish v. Dodge*, 4 Denio, 311; *Catlin v. Valentine*, 9 Paige, 575; *Campbell v. Seaman*, 63 N. Y. 568; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 id. 10; Wood on Nuis. sec. 497.)

It was claimed by the defendant, and the court refused a request to charge "that unless the jury should find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at these works were unskilful and incapable, their verdict should be for the defendant;" and "that if the odors which affect the plaintiff are those that are inseparable from the manufacture of gas with the most approved apparatus and with the utmost skill and care, and do not result from any defects in the works, or from want of care in their management, the defendant is not liable." An exception to this ruling raises the principal question discussed in the case.

While every person has exclusive dominion over his own property, and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights. The maxim "*Sic utere tuo ut alienum non lædas*" limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood.

The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced, holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion.

In *Campbell v. Seaman*, *supra*, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery.

In *Heeg v. Licht*, 80 N. Y. 579, an action for injuries arising from the explosion of fire-works, the trial court charged the

jury that they must find for the defendant, "unless they found that the defendant carelessly and negligently kept the gunpowder on his premises." And he refused to charge, upon the plaintiff's request, "that the powder magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not." There was a verdict for the defendant, and this court reversed the judgment, holding that the charge was erroneous. In *Cogswell v. N. Y. & N. H. R. R. Co.*, *supra*, the Special Term found, as facts, that in the construction of the engine-house and coal-bins, and in the use of its premises, the defendant exercised due care, so far as the same was practicable, and it refused to find, upon plaintiff's request, "that in the construction of the engine-house, chimney, smoke-pipe and coal-bins, it had not exercised, and does not now exercise, such reasonable and proper care as was necessary not to injure the plaintiff's property." A judgment for the defendant was reversed, this court holding that the engine-house as used was a nuisance, and that it was not an answer to the action that the defendant exercised all practicable care in its management. In *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257, the charge of the court, and the refusals to charge, were very similar to the charge in this case. The Supreme Court of Pennsylvania overruled the exceptions, holding that negligence was not essential to a right of recovery. To the same effect see *Cleveland v. C. G. L. Co.*, 20 N. J. Eq. 201; *O. G. L. & C. Co. v. Thompson*, 39 Ill. 598; Wood on Nuis. (2d ed.) sec. 553.

The principle that one cannot recover for injuries sustained from lawful acts done on one's own property without negligence and without malice, is well founded in the law. Every one has the right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him. The wants of mankind demand that property be put to many and various uses and employments, and one may have, upon his property, any kind of lawful business, and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. Such losses the law regards

as *damnum absque injuria*. And under this principle, if the steam boiler on the defendant's property, or the gas retort, or the naphtha tanks had exploded and injured the plaintiff's property, it would have been necessary for her to prove negligence on the defendant's part, to entitle her to recover. (*Losee v. Buchanan*, 51 N. Y. 476.)

But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application and the law of nuisance applies. (*Hay v. Cohoes Co.*, 2 N. Y. 159; *McKeon v. See*, 51 id. 300.)

The exception to the refusal to charge the first proposition above quoted was not, therefore, well taken.

It is contended, however, by the defendant, that the acts of the legislature relating to gas companies are a protection from liability for consequential injuries flowing from the manufacture of gas, or the prosecution of the business, when want of care forms no element of the cause of injury, and it is sought to apply to this case the broad principle that that which the law authorizes cannot be a nuisance, although it may occasion damages to individual rights and property. [Upon this point the judge adopts the doctrine of 108 U. S. 317, *supra*.]

* * * * *

These views lead to the conclusion that the defendant obtained no immunity from liability for consequential injuries sustained by property surrounding its works by reason of its incorporation, or the privilege conferred upon the business by the acts of the legislature, and that the facts of the case do not take it out of the operation of the rules of law applicable to ordinary common-law nuisances.

The legislature has given to the corporations created to manufacture gas the right to lay down their conductors in the public streets subject to the control and regulation of the municipal authorities, and for acts done in the execution of that privilege they are exempt from prosecution at the suit of the people.

The choice, however, of the place to locate their works, and the selection of materials from which to manufacture gas,

has been left to the corporations, and those things must be performed with reference to the rights of others.

The fact appears in this case that for twenty years the defendant conducted its business without annoyance to any one. For the sake of economy (so it alleges) it adopted, in 1880, a new process and new materials from which to make its gas. The result, under the finding of the jury, has been to impair the value of the plaintiff's property and substantially to interfere with its comfortable enjoyment. If the defendant's contention should prevail, there would be no restraint upon the location of the business, and no limit to the offensive character of the materials it might use. It would thus have an immunity which the law denies to every other citizen.

We think the proof permitted the conclusion that the defendant had created a nuisance, and that there was no error in the charge of the court, or the refusal to charge.

The judgment must be affirmed.

HAIGHT, J. (dissenting). This action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of offensive odors proceeding from the gas-works of the defendant, and to obtain an injunction restraining the defendant from permitting further emissions of such odors.

The complaint alleges negligent and unskilful construction of the works, and also negligence in the use and maintenance thereof.

* * * * *

The question is thus presented as to whether the works of the defendant are, in the absence of negligence either in their construction or operation, a nuisance *per se*, for if the odors emanating therefrom are inseparable from the manufacture of gas with the most approved apparatus and with the utmost skill and care, and do not result from any defects in their management, it follows that all works for the manufacture of gas are nuisances as to those living near enough to the plant to be affected by the odor, even though they located there subsequent to the works. The question is one of importance. It is not free from difficulty, and the authorities treating upon the subject are not in entire harmony.

A nuisance, as it is ordinarily understood, is that which is offensive and annoys and disturbs. A common or public nuisance is that which affects the people and is a violation of a public right, either by direct encroachment upon public property or by doing some act which tends to a common injury, or by the omitting of that which the common good requires, and which it is the duty of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct working an obstruction or injury to the public and producing material annoyance, inconvenience and discomfort. Founded upon a wrong, it is indictable and punishable as for a misdemeanor. It is the duty of individuals to observe the rights of the public and to refrain from the doing of that which materially injures and annoys or inconveniences the people, and this extends even to business which would otherwise be lawful, for the public health, safety, convenience, comfort or morals is of paramount importance, and that which affects or impairs it must give way for the general good. In such cases the question of negligence is not involved, for its injurious effect upon the public makes it a wrong which it is the duty of the courts to punish rather than to protect. But a private nuisance rests upon a different principle. It is not necessarily founded upon a wrong, and consequently cannot be indicted and punished as for an offence. It is founded upon injuries that result from the violation of private rights and produce damages to but one or few persons. Injury and damage are essential elements, and yet they may both exist and still the act or thing producing them not be a nuisance. Every person has a right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of another, however much damage others may sustain therefrom, his use is lawful and it is *damnum absque injuria*. (*Thurston v. Hancock*, 12 Mass. 222.)

So that a person may suffer inconvenience and be annoyed, and if the act or thing is lawful and no rights are violated, it is not such a nuisance as the law will afford a redress; but if his rights are violated, as for instance if a trespass has been

committed on his land by the construction of the eaves of a house so that the water will drip thereon, or by the construction of a ditch or sewer so that the water will flow over and upon his premises, or if a brick kiln be burned so near his premises as that the noxious gases generated therefrom are borne upon his premises, killing and destroying his trees and vegetation, it will be a nuisance for which he may be awarded damages. (*Campbell v. Seaman*, 63 N. Y. 568.)

Hence it follows that in some instances a party who devotes his premises to a use that is strictly lawful in itself may, even though his intentions are laudable and motives good, violate the rights of those adjoining him, causing them injury and damage, and thus become liable as for a nuisance. It, therefore, becomes important that the courts should proceed with caution and carefully consider the rights of the parties and not declare a lawful business a nuisance except in cases where rights have been invaded, resulting in material injury and damage. People living in cities and large towns must submit to some inconvenience, annoyance and discomforts. They must yield some of their rights to the necessity of business, which, from the nature of things, must be carried on in populous cities. Many things have to be tolerated that under other circumstances would be abated, the necessity for their existence outweighing the ill results that proceed therefrom. Therefore, as to business which is lawful and reasonable and is not of itself a nuisance when properly conducted, which is carried on upon one's own premises, invading no right of a neighbor, is not such a nuisance as the law will afford redress, even though it produces an inconvenience and annoyance, unless such inconvenience and annoyance is the result of negligence and carelessness; but where the business is of that character as to become a common nuisance, the damages may be recovered even though no negligence is shown. (*Rockwood v. Wilson*, 11 Cushing, 221-226.)

The distinction between the two cases is that in the former the business is not of that nature as to injuriously affect others, but may become so by the negligent manner in which it is carried on; whilst in the latter case the nature of the business is such as must necessarily be injurious, even though

managed with the greatest care and skill. (Wood's Law of Nuisances (2d ed.) sec. 127.)

Again, there is another class of cases in which the question of negligence is material, as, for instance, where the legislature has authorized the doing of that which would otherwise be a nuisance. In such cases the person is shielded from liability for damages that ensue, unless he is chargeable with negligence for the manner in which the act was done. (*Radcliff v. Mayor &c.*, 4 N. Y. 195; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *Kellinger v. F. S. S. & G. S. F. R. R. Co.*, 50 id. 206-212; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98-107; *Conklin v. N. Y., O. & W. R. Co.*, 102 id. 107; *Ottenot v. N. Y., L. & W. R. Co.*, 28 N. Y. S. R. 483.)

As, for instance, a person may be annoyed and inconvenienced by the noise and tread of passing railway trains, and yet where the railroad is lawfully built, and is managed with proper care and skill, it is not a nuisance, even though it passes near to a dwelling-house and materially disturbs the quiet and slumber of the occupants. (*Beseman v. P. R. R. Co.*, 50 N. J. L. 235.)

But the authority of the legislature should doubtless be express (*Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10), and relate to matters of public utility in which the people have an interest and the right of control. (*B. & P. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317-332.)

We are thus brought back to the question as to whether the business of manufacturing gas by the defendant is in and of itself a nuisance.

* * * * *

It is undoubtedly true that in the manufacture of gas the escape of some is unavoidable, and it may inconvenience those who live in the immediate vicinity of the works, but the necessities of people living in large cities and villages imposes some inconvenience to others, and has compelled recognition of the principle that each member of society must submit to annoyances consequent upon the use of property, provided such use is reasonable as respects the owner and those immediately affected in view of time, place and other circumstances. (*St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642-646; *Cooley on Torts*, 598-601.)

We are aware that a different view has been expressed in reference to gas-works. (*Carhart v. A. G. L. Co.*, 22 Barb. 297-312.) But, notwithstanding this, our conclusions are that, in view of the circumstances, the public character and utility, the business is lawful, authorized by the legislature and that it is not a nuisance if properly conducted. It may, however, be carried on in such a manner as to unnecessarily affect and injure others, in which case it would become a nuisance. If we are correct in this view the question of negligence was involved in the case and should have been submitted to the jury. As we have seen, time, place and circumstances have an important bearing upon the question. A person may negligently select an improper place for the establishment of his business. That which would be proper and tolerated in one locality would not be in another. Negligence may also exist in the construction as well as in the management and operation. Each person should conduct his business with the best approved apparatus, with such skill and care as experienced and prudent persons may possess, in order that he may do his neighbor as little harm as possible. (*People v. Sands*, 1 Johns. 78-88.)

We do not understand it to be claimed that the defendant was guilty of maintaining a public nuisance, or that it is chargeable with any fault or negligence in the selection of the locality in which it erected its works. It is claimed that they were constructed of the best material according to the best known plan, and operated with the highest degree of skill and care. For twenty years they were operated without complaint. The plaintiff, subsequent to the location of the defendant, purchased the adjoining property and took up her residence thereon. It is true that she claimed to be affected from the odors that came from the naphtha tank constructed near her premises, and that that was constructed after she became a resident there. It is possible that the defendant negligently located its tank in an improper place, but that question was not submitted to the jury. Neither was the question as to whether the odors proceeding from this tank produced the nuisance. The question submitted was as to whether the odors proceeding from the entire gas-works constituted a nuisance. It was also true that there was also some evidence tending to show that the plaintiff's health

had been affected. She testified that on some occasions she had been affected with nausea, but the question as to whether the works affected the health of the public or of the plaintiff was not submitted. On the contrary, it was expressly taken from the jury by the instruction to which the exception was taken, in which the court stated that it would be a nuisance "whether it affected the health of the plaintiff and her family or not."

* * * * *

The defendant's business is of a public nature and utility. If it is a nuisance *per se*, and without the protection of the statute, an individual may procure it to be enjoined and thus drive it from place to place whilst another individual, living upon the line of its mains, may compel the company, by mandamus, to proceed with its business and supply his residence with illuminating gas, thus producing a condition in which the company would be liable if it did, and would also be liable if it did not.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

*Judgment affirmed.*¹

All concur with BROWN, J., except FOLLETT, Ch. J., and HAIGHT, J., dissenting.

ROGERS V. ELLIOTT.

(146 Mass. 349. — 1888.)

H. M. Knowlton for the plaintiff.

J. J. McDonough for the defendant.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church, used

¹ In *Norcross v. Thoms*, 51 Me. 503, the court held that a jury might infer a nuisance from evidence that a blacksmith shop was so placed and used as to inconvenience another. The court said, "The only accurate method of ascertaining the meaning of the term nuisance at common law is to examine decided cases adjudged to be, or not to be nuisances." In *Campbell v. Seaman*, 63 N. Y. 568, defendant's brickyard produced occasional injury to plaintiffs' ornamental shrubs and trees, and was used before plaintiffs bought their lands and beautified them, yet plaintiffs had an injunction.

for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town, and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. (*Wesson v. Washburn Iron Co.*, 13 Allen, 95.)

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper, necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of the noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering,

nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house, not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow. (*Fay v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 133 Mass. 289; *Walter v. Selfe*, 4 DeG. & Sm. 315, 323; *Soltau v. DeHeld*, 2 Sim. (N. S.) 133; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642.)

In *Walter v. Selfe*, Vice-Chancellor Knight Bruce, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age, or whatever their state of health."

It is said by Lord Romilly, Master of the Rolls, in *Crump v. Lambert*, L. R. 3 Eq. 409, that "the real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence." In the opinion in *Sparhawk v. Union Passenger Railway*, 54 Penn. St. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence." In the case of *Westcott v. Middleton*, 16 Stew. (N. J.) 478, it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chan-

cellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor, because he is so morally and mentally constituted that the particular business complained of is an offence or a nuisance to him, or destructive to his comfort or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. . . . A wide range has indeed been given to courts of equity in dealing with these matters; but I can find no case where the court has extended aid unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike."

If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evi-

dence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However this request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff in his brief concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.

ABATEMENT OF NUISANCES.

BROWN v. PERKINS.

(12 Gray, 83. — 1858.)

O. P. Lord and J. W. Perry for the plaintiff.

S. H. Phillips and R. S. Rantoul for the defendants.

SHAW, Ch. J. This is an action for breaking and entering the plaintiff's shop, and destroying various articles of property.

The defendants, denying the facts, and putting the plaintiff to proof, insist that if it is proved that they were chargeable with the breaking and entering, it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and so was declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the proof shows that it was done; that the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they en-

tered for such purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

A great many points were raised in the report, and argued, upon which the court have not passed; they are all passed over now for the purpose of coming to the main points which are decisive of the case.

The judge who sat at the trial stated that he ruled the law and directed the jury as stated in the report, subject to the opinion of the whole court, and when many other points were raised, he stated that it might be more convenient to report the whole case, so far as controverted points were presented, for the consideration of the whole court; and this, it was understood, was assented to by counsel.

Passing over all questions as to the plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion, after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not of themselves a common nuisance, but the act of keeping them for sale by statute creates a nuisance; and the only mode in which they can be lawfully destroyed is the one directed by statute, for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. Therefore it is not lawful for any person to destroy them by way of abatement of a common nuisance, and *a fortiori* not lawful to use force for that purpose.

2. It is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never intrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgment of

his peers or the law of the land; and no person can be twice punished for the same offence. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4. The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water-course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the Commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a private nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law. (*Lonsdale v. Nelson*, 2 B. & C. 311, 312, and 3 D. & R. 566, 567; *Mayor &c. of Colchester v. Brooke*, 7 Ad. & El. N. R. 376, 377; *Gray v. Ayres*, 7 Dana, 375; *State v. Paul*, 5 R. I. 185.)

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such a use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children or servants of any person do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may

be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside and a

*New trial had.*¹

AMOSKEAG M. CO. v. GOODALE.

(46 N. H. 53. — 1865.)

TRESPASS *quare clausum fregit*, for entering and wilfully and maliciously removing, breaking and destroying 400 feet of plaintiff's flash-boards, and pulling out the iron pins, against which said flash-boards rested, which formed a part of said plaintiff's dam, and wilfully turning aside and diverting the waters of the Merrimack river from plaintiff's mills, etc.

E. A. Hibbard (with whom was *Fellows*) for defendant.

S. N. Bell for plaintiff.

BARTLETT, J. After the numerous decisions in this State and elsewhere, we cannot now regard it as an open question, whether the defendant would have been entitled to recover nominal damages of the plaintiffs, if they by their dam wrongfully caused the water of the river to flow back on his land perceptibly higher than its natural level, but without causing any actual damage to the defendant, for the "infringement of his right, which by repetition might ripen into an easement," has been held a sufficient cause of action. (*Tillotson v. Smith*, 32 N. H. 90; *Woodman v. Tufts*, 9 N. H. 91; *Snow v. Cowles*, 22 N. H. 302; *Cowles v. Kidder*, 24 N. H. 379 and 382; *Bassett v. Salisbury Co.*, 28 N. H. 455; *Gerrish v. Newmarket Co.*, 30 N. H. 484; 2 Hill. on Torts, 115, 126; Angell on W. C. 330, 340; Washburn on Easements, 569; and see *Bassett v. Salisbury Co.*, 43 N. H. 578, and *Eastman v. Amoskeag Co.*, 44 N. H. 159.)

Where a party can maintain an action for a nuisance he may enter and abate it (*Baten's Case*, 9 Co. 54 b.; 3 Blk.

¹ The reporter notes that the death of the chief justice "prevented the writing out of a fuller opinion."

Com. 220; 2 Hill. on Torts, 94 and 97, n., and *Brown v. Perkins*, there cited; 1 Hill. on Torts, 147; *Great Falls Co. v. Worcester*, 15 N. H. 438; Angell on W. C. sec. 389, and see *Groton v. Haines*, 36 N. H. 394; even though at times it caused but nominal damage to him (*Great Falls Co. v. Worcester*, 15 N. H. 434; *Penruddock's Case*, 5 Co. 101 b.; *Adams v. Barney*, 25 Vt. 231; *Greensdale v. Halliday*, 6 Bingham 379; Washburn on Easements, 582, 584; Com. Dig. "Action on the case," D. 4.; Angell on W. C. sec. 390).

Although in general an erection cannot be abated as a nuisance unless it be such at the time (*Great Falls Co. v. Worcester*, 15 N. H. 442; Washburn on Easements, 583; Angell on W. C. secs. 140, 390); yet an erection may be a nuisance at a time when it is causing no actual damage (*Fay v. Prentice*, 1 C. B. 828; Broom's Leg. Max. 290 and 292; and see *Beach v. Trudgain*, 2 Gratt. 219); and might have been abated as a nuisance on a *quod permittat* (*Baten's Case*, 9 Co. 53 b.), or by the party whose rights were infringed. (*Penruddock's Case*, 5 Co. 101 b.). The remarks of Best, Ch. J., in *Lonsdale v. Nelson*, 2 B. & C. 302, cited by the plaintiff, were made in reference to "nuisances from omission" only; and the expressions of Fowler, J., in *Graves v. Shattuck*, 35 N. H. 269, have reference solely to the necessity of the force used to the protection of the party's property, and not to the general question of a party's right to abate a nuisance which causes him nominal damages.

The instructions of the court that the defendant would be justified in entering to remove the flash-boards wrongfully kept upon the dam, only in case they caused him actual damage or made him apprehensive of immediate material injury, were erroneous.

* * * * *

The verdict must be set aside.

HICKS v. DORN.

(42 N. Y. 47. — 1870.)

PLAINTIFF'S boat was moving from a dry dock into the Erie Canal at Vischer's Ferry, when the waste weir and gates of the dock suddenly gave way, letting out the water and leaving the boat projecting into the basin of the canal about 45 feet. It was not practicable to render the canal again navigable, without damming up the culvert, or restoring the dam and waste weir of the dry dock, or building a coffer dam around the stern of the boat, or cutting up and destroying the boat. The destruction of plaintiff's boat was the speediest way of restoring navigation. Defendant adopted it in good faith. The referee before whom the case was tried held the defendant was guilty of trespass, and found plaintiff's damages at \$1856.14. Judgment was affirmed by the General Term, and defendant appealed.

Nathaniel C. Moak for the appellant.

Isaac Lawson for the respondent.

EARL, Ch. J. It was the duty of the defendant, as superintendent of canal repairs, to keep in repair the section of the canal intrusted to him, and to remove obstructions to navigation; and he claims protection in this case on the ground that he was in the proper discharge of this duty when he cut up the plaintiff's boat.

* * * * *

It is claimed that the canal is, in law, a public highway, and that this boat was a public nuisance in such highway, interrupting navigation, which any person, and certainly a public officer, had a right to remove. It is not alleged in the answer, and it was not found by the referee, that it was a nuisance. Navigation was interrupted by the want of water, caused by the break; not so much by the boat. This boat was not in the canal in such a way as to interfere with the passage of boats. But there should have been an issue and finding upon this point. If the referee had found that this boat was a nuisance, the de-

fendant would not necessarily have been justified in destroying it. In removing or abating nuisances, no unnecessary damage or injury to property can be justified, and the referee might have found still, as he has found, that the defendant should have adopted some other method to restore navigation than the destruction of the boat.

* * * * *

The plaintiff's boat was valuable private property. The plaintiff was in no degree in fault, and he did not in any way contribute to the break that caused the interruption of navigation. The duty of the defendant was imperative to repair the canal, and though the plaintiff's boat was private property, he had the right to destroy it, if such destruction was necessary to enable him to restore navigation. This right did not arise simply because it was more convenient to repair the canal by destroying the boat, nor because this was the cheapest or speediest way to do it. The destruction of this private property should have been a last resort, after other reasonable expedients had failed. When a public officer undertakes to destroy private property under the claim of great public or overruling necessity, he takes upon himself the burden of showing such necessity. (*Russell v. The Mayor &c. of New York*, 2 Denio, 475.) All that can be claimed in this action is, that it was more convenient and speedier to repair in the way adopted than in any other. This does not make a case of overwhelming or pressing necessity within the rule. All the facts were before the referee, and it was for him, upon the evidence, to determine whether the defendant discharged his duty as a reasonable, prudent and careful man; whether the defendant was justified in pursuing extraordinary rather than ordinary methods, and whether there was a pressing necessity for the destruction of the private property in question, and we ought not to disturb his decision upon these questions.

I therefore favor an affirmance of the judgment appealed from.

Judgment affirmed.

CRAWFORD v. TYRRELL.

(128 N. Y. 341. — 1891.)

GRAY, J. In this action, which was brought to restrain the defendant from keeping a house of ill fame and from using his premises as an assignation house, and to recover damages for injuries sustained, the trial court found as facts that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, "whereby the use and occupation of the plaintiff's premises had been interfered with and rendered uncomfortable, and whereby the occupants of the plaintiff's premises have been annoyed and seriously disturbed." Such a finding was amply justified by the evidence, and, indeed, it is not discussed by the appellant; but he argues that the plaintiffs could not maintain a civil action of this nature, inasmuch as the damage they suffered was a damage common to the whole community, and not special to them. If that position had been sustained by the facts, I do not doubt but that it would have been the duty of the trial judge to have denied the relief prayed for. The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on which may be shown to be immoral, and, therefore, prejudicial to the character of the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person; and, though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in the common interest, to interfere for the suppression of the common nuisance. (See *Francis v. Schoellkopf*, 53 N. Y. 152.) If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnox-

ious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in a similar manner. The principle has been long settled that the objection that the nuisance was a common one is not available if it be shown that special damage was suffered. (*Rose v. Miles*, 5 Maule & S. 101; *Rose v. Groves*, 5 Man. & G. 613; *Francis v. Schoellkopf*, *supra*; *Lansing v. Smith*, 4 Wend. 9.) One who uses his property lawfully and reasonably, in a general legal sense, can do injury to nobody. In the full enjoyment of his legal rights in and to his property the law will not suffer a man to be restrained, but his use of the property must be always such as in no manner to invade the legal rights of his neighbor. The rights of each to the enjoyment and use of their several properties should, in legal contemplation, always be equal. If the balance is destroyed by the act of one, the law gives a remedy in damages, or equity will restrain. If the use of a property is one which renders a neighbor's occupation and enjoyment physically uncomfortable, or which may be hurtful to the health, as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features, a private nuisance is deemed to be established, against which the protection of a court of equity power may be invoked. In the present case the indecent conduct of the occupants of the defendant's house, and the noise therefrom, inasmuch as they rendered the plaintiff's house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action.

If it was a nuisance which affected the general neighborhood, and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action

for any injury sustained, and to their equitable right to have its continuance restrained.

The judgment appealed from should be affirmed, with costs.

All concur, except FINCH, J., absent.

MISSOURI, K. & T. RY. v. BURT.

(27 S. W. 948. [Tex. Civ. App.] 1894.)

ACTION for damages caused by defendant's leaving the dead animal on its property, and thus creating a nuisance to plaintiff's injury. Judgment for \$150, from which the railroad company appealed.

COLLARD, J. Appellant contends that, as the proof showed that plaintiff could have hauled the dead animal off of the right of way, or buried it, with slight expense, he was bound to do so in the exercise of reasonable care, and that by failure to do this he was guilty of contributory negligence. The defendant's road where the dead animal lay was fenced. The mule was killed by defendant's cars running over it, and it was allowed to remain on the right of way inside defendant's fence, so near plaintiff's house as to create a nuisance. Plaintiff was not bound to remove the dead animal. To do so he would be compelled to make an opening in defendant's fence, and enter upon the right of way, or to commit a trespass. The judgment of the lower court is affirmed.

Affirmed.

PARTIES LIABLE FOR A NUISANCE.

SIMMONS v. EVERSON.

(124 N. Y. 319. — 1891.)

THE trial court found that for many years prior to October 18, 1887, the appellants owned in severalty three lots, each being twenty-two feet wide, and bounded on the east by the centre line of South Salina street, in the city of Syracuse. The south lot was owned by the defendant Lynch, the middle by the defendant Pierce and the north one by the defendant Everson. On these lots stood three brick stores, separated from each other by brick partition walls extending from the foundation to the roofs. A continuous brick wall of uniform height (about 60 feet) and thickness, stood adjacent to the west line of the street and formed the front of the buildings. The partition walls and the front wall were interlocked or built together.

On the date mentioned the three stores were substantially destroyed by fire, nothing being left standing except the front wall, a part of the partition walls and a small part of the wood work in the front of Everson's building. Shortly after this event the front wall began to lean towards the street, and continued to incline more and more in that direction until November 17, 1887, when it gave way near the point where it was united with the partition wall between the buildings of Lynch and Pierce, carrying down the entire front and part of both partition walls. Material from the part of the front wall standing on the lots of Everson and Pierce, and from their partition wall, fell on and killed the plaintiff's intestate, who was lawfully on the sidewalk near the boundary between their properties. No part of the walls on Lynch's lot fell on decedent. It was found that immediately after the fire the front and part of the partition walls became weak, unsafe, dangerous and liable to fall into the street, and that each of the defendants was careless and negligent in not removing or supporting the walls on his own lot, and that the several neglects of the defendants united and directly caused the

walls to fall. It was further found that these walls were so unsafe that they were a public nuisance, and also that the decedent did not negligently contribute to the accident or to his own death. The damages were assessed at \$5000.

M. M. Waters for appellant Everson.

Smith, Kellogg & Wells for appellant Pierce.

Hiscock, Doheny & Hiscock for appellant Lynch.

William Nottingham for respondents.

FOLLETT, Ch. J. It is urged, in behalf of the defendants, that at most this is but a case of several independent acts of negligence committed by each, the joint effect of which caused the accident, and for which they are not jointly liable within the rule laid down in *Chipman v. Palmer*, 77 N. Y. 51.

The case at bar does not belong to the class of actions arising out of acts or omissions which are simply negligent, and while the defendants did not intend by their several acts to commit the injury, their conduct created a public nuisance which is an indictable misdemeanor under the statutes of this State (Penal Code, secs. 385, 387; *Vincett v. Cook*, 4 Hun, 318) and at common law. (*Regina v. Watts*, 1 Salk. 357; *S. C.* 2 Ld. Raym. 856; 1 Russ. Cr. (5th ed.) 423; 2 Whar. Cr. Law, sec. 1410; Big. Torts, 237; Pol. Torts (2d ed.) 345; Stephen's Dig. Cr. Law, art. 176; Indian P. C. sec. 268.)

Persons who by their several acts or omissions maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate and probable consequence of it. (*Irving v. Wood*, 51 N. Y. 224, 230; *Slater v. Mersereau*, 64 id. 138; *Timlin v. Standard Oil Co.*, 54 Hun, 44; *Klauder v. McGrath*, 35 Penn. St. 128; 1 Shear. & R. Neg. (4th ed.) sec. 122; Pol. Tort (2d ed.) 356.)

The fall of these four-story brick walls into the street, was the direct and immediate consequence of the several acts of the defendants in suffering the portions standing on their

own lots to remain unsupported after they had visibly begun to incline towards the street, and it was as obvious before as it was after the accident that if any part of the front wall fell, a large part of it must, and that it would go into the street.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except VANN, J., not voting.

GALLAGHER v. KEMMERER.

(144 Pa. St. 509. — 1891.)

CLARK, J. This action of trespass on the case was brought by Bernard Gallagher, to recover damages for injuries to his land from a deposit of mine water, culm, and dirt, accumulated thereon from the defendants' mining operations on Sandy Run creek, in Luzerne County. The creek has its source in the mountains, about four or five miles above Gallagher's land, through which it passes. The defendants' operations were commenced in the year 1877. The plaintiff alleges that in the process of washing their coal the refuse, culm, and dirt were conducted in chutes, which emptied the dirt into the creek, and by the waters of the creek were carried to and thrown upon his meadow land, covering 20 acres or more, and rendering the land barren and wholly unproductive. It appears, however, that the Highland Coal Company, operated by Markle & Co., had been mining coal several miles above on the same stream from 1864, and that that company has ever since been so engaged continuously to the bringing of this suit. The plaintiff alleges that the culm and dirt from both these mines could, at a moderate and reasonable expense, have been banked, and if this had been done no appreciable injury would have resulted; and, further, that the Highland Coal Company, to some extent at least, pursued this plan, but the defendant company dumped the refuse of their mines directly into the stream. In August, 1884, Bernard Gallagher, in consideration of the sum of \$400, by formal writing

under seal, released the Highland Coal Company from all claims and demands for damages, and from compensation for injuries then or thereafter done to his property, either from the pollution of the stream, or from the deposit of refuse matter upon his lands by that company. It may be fairly inferred from this that the Highland Coal Company did, in some degree, contribute to the injuries of which the plaintiff complains. At the trial, the defendant presented a point for instruction to the jury, as follows: "That as it appears from the evidence that the plaintiff settled with Markle & Co. for damages sustained by him for the fouling of Sandy Run, and the deposit of culm on his land by them, and it being impossible, under the evidence, to separate it, and ascertain the proportion of the damage caused by them and by the defendants, it having been occasioned by simultaneous and contemporaneous acts, the settlement must be regarded as an accord and satisfaction for the whole damage, and the plaintiff cannot recover in this action." This point was negatived, and that is the first error assigned. It is argued, on the part of the appellants, that the injury to which the plaintiff was subjected was of such a character that it could not, as between the parties who caused it, be divided, so as to determine in what proportion it was caused by each; and that, even if the defendants' mines had not been operated, the mining operations of the Highland Coal Company would have resulted in the same injury. It is true that the injury complained of may have been caused in part by the operations of the Highland Coal Company, conducted contemporaneously with the operations of the defendants' mines, and that it would be difficult, if not quite impossible, to separate and ascertain, definitely or certainly, the proportion of the whole damage done by each of these operations, respectively. But these several operations were entirely independent of each other. They were several miles apart, and the ownership, management, and control were wholly distinct and separate. There was no concert of action, or common purpose or design, which would support the theory of joint injury. The case, in this branch, is ruled by *Little Schuylkill Co. v. Richards*, 57 Pa. St. 142. In that case, the milldam was filled by deposits of coal dirt from different mines. The court below charged the jury that if,

at the time the defendants were throwing dirt into the river, the same thing was being done by other collieries, and the defendants knew it, they were liable for the combined result. This instruction was held to be erroneous. "The ground of action," it was there said, "is not the deposit of the dirt in the dam, but the negligent act above. The defendants' liability therefor began with the act on their own land, and they were responsible for the consequences; and, as the negligent act was separate and independent of the acts of the other miners, it was several when committed, and did not become joint, because the general consequences were united." "Without concert of action," said this court in the case cited, "no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These principles are fully sustained by the following cases: *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9; *Van Steenburgh v. Tobias*, 17 Wend. 562; *Buddington v. Shearer*, 20 Pick. 477; *Auchmuty v. Haam*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479." Unless the negligence of two persons is joint and concurrent, each is liable for his own negligence only. (*Boyd v. Insurance Patrol*, 113 Pa. St. 269.) To the same effect are the cases of *Seely v. Alden*, 61 Pa. St. 306; *Leidig v. Bucher*, 74 Pa. St. 67; and *Little Schuylkill Co. v. French*, *81 Pa. St. 366. It is a matter of no consequence whatever that the stream was not a public highway; that fact could not in any way affect the principle referred to; and, if the Highland Coal Company was not a joint tort-feasor, it is immaterial in what form the release was effected, whether by deed or otherwise. . . .

The judgment was reversed on another ground.

CHAPTER XL

NEGLIGENCE.

TOWANDA RY. CO. v. MUNGER.

(5 Den. 255. — 1848.)

A. Sampson for the plaintiffs in error.*W. J. Bacon* for the defendant in error.

BEARDSLEY, Ch. J. These oxen, when killed, were on the defendant's land. They had broken from the plaintiff's field into the highway, along which they wandered to the railroad, where, leaving the highway, they passed on the railroad to the place where the accident occurred.

* * * * *

If these oxen were not "lawfully going at large on the highways," their entry on the defendants' land could not be excused by the want, or defect of fences. The oxen were not in the highway for the ordinary purpose of travel in passing from one place to another, but having broken out of the plaintiff's field, were literally "at large," for grazing, rest or mischief, as their wants or instinct might prompt. This, in my judgment, was far enough from "lawfully going at large" in a highway, notwithstanding the legislature have declared that towns may determine the times and manner in which cattle, horses and sheep shall be permitted to go at large.

* * * * *

The present action is founded upon the alleged negligence of the agents and servants of the defendants, in running their engine on the railway, whereby, as is charged, the plaintiff's oxen were killed. It is not pretended the act was done,

designedly, by the persons in charge, but simply that it occurred through their negligence and want of care.

It is a well-settled rule of law that such an action cannot be sustained if the wrongful act of the plaintiff co-operated with the misconduct of the defendants or their servants to produce the damage sustained. I do not mean that the co-operating act of the plaintiff must be wrong in intention, to call for the application of this principle, for such is not the law. The act may have been one of mere negligence on his part, still he cannot recover. Or his beast, while trespassing on the land of another person, and that without the consent or knowledge of its owner, may have been damaged through some careless act of the owner of the land, yet the fact of such trespass constitutes a decisive obstacle to any recovery of damages for such an injury. It is, strictly speaking, *damnum absque injuria*.

The case of *Blyth v. Topham*, Cro. Jac. 158, was an action for digging a pit in a common, by occasion whereof the plaintiff's mare, *straying there*, fell into the pit and was killed. It was held by the whole court that the action would not lie; the plaintiff had no right in the common, and so, as against him, the digging of the pit was lawful. Precisely so in the present case; the plaintiff shows no right to have his oxen on the track of this railroad, for they were there straying; he therefore cannot set up that the engine was unfit for use or was run in a negligent manner.

Bush v. Brainard, 1 Cowen, 78, was in principle like that of *Blyth v. Topham*. Some maple syrup had been left by the defendant in buckets in an open shed on his own unenclosed woodland. The plaintiff's cow came in the night and drank the syrup, which caused her death. It was agreed by the court "that, although the defendant was guilty of gross negligence," "the plaintiff, having no right to permit his cattle to go at large" on the defendant's land, could not recover.

* * * * *

Where that which is done by a party on his own land is illegal and punishable as such; or, although not illegal, if it be an act which probably may endanger human life, as the setting of spring guns, he may be responsible even to a volun-

tary trespasser for injuries thus sustained. (*Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Crump*, *supra*.) But even in such a case, where the plaintiff had notice that deadly engines were placed in a wood, into which he, notwithstanding, entered and was severely wounded, it was held he could not maintain any action, having voluntarily brought the injury upon himself. (*Ilott v. Wilkes*, 3 B. & Ald. 304.) One who complains of another's negligence, should himself be without fault. (*Brownell v. Flagler*, 5 Hill, 282; *Cook v. The Champ. Trans. Co.*, 1 Denio, 99.) Where the plaintiff, at the time of the alleged injury, was trespassing on the defendant, or otherwise wrong in the particular act complained of, such delinquency alone, with very limited exceptions, is a decisive answer to any claim for damages founded on the defendant's negligence.

Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrong-doer. A horse straying into a field falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrong-doer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. (Story on Bl. secs. 19, 22; *Gardner v. Heartt*, 3 Denio, 236.) Of the latter, a trespasser may complain, although he cannot be allowed to do so in regard to the former.

In the present case the charge of the court was in several material respects erroneous. As to passengers on this railroad, the defendants were certainly bound by the highest obligations of morality and law, to run their engines and trains, with the most scrupulous care and vigilance. It was also their duty to use every precaution to guard against communicating fire to buildings or other property, adjacent to the line of their road,

or otherwise doing injury thereto. But they owed no such duty to this plaintiff in regard to his oxen when trespassing on their land. The suggestions of the court below, on this part of the case, would be very appropriate to a case between a passenger who had been injured through the negligence of an engineer, or the conductor of a train, but had no proper bearing on the case then to be decided by the jury.

The court seem to have held that if the plaintiff's oxen escaped from his enclosure after the exercise of "ordinary care and prudence in taking care of" them, he was not responsible for their trespass on the defendant's land. This view of the law, we think, cannot be sustained. The plaintiff was bound at his peril to keep his cattle at home, or at all events to keep them out of the defendant's close, and no degree of "care and prudence," if the cattle found their way on to the defendant's land, would excuse the trespass. It would be a new feature in the law of trespass, if the owner of cattle could escape responsibility for their trespasses by showing he had used "ordinary," or even extraordinary "care and prudence," to keep them from doing mischief.

* * * * *

I am strongly inclined to the opinion that further legislation would be proper to guard against the entry of cattle on land used for the tracks of railways. The loss of property in this manner is of no trivial consequence; but the personal injuries thus inflicted, and the occasional loss of human life, demand that every practicable effort should be made to avert such deplorable consequences.¹

The judgment below should be reversed, and a *venire de novo* awarded.

Judgment reversed.

¹ Such legislation was enacted L. 1850, c. 140, § 44, amended L. 1854, c. 282, § 8. For the law on this subject at present in New York, see *Dolan v. N. D. & C. Ry. Co.*, 120 N. Y. 571.

CURTIN v. SOMERSET

(140 Penn. St. 70. — 1891.)

PAXSON, C. J. The defendant, Philip H. Somerset, entered into a contract with the Sea Isle City Hotel Company, for the erection of a hotel building, at Sea Isle City, according to certain plans and specifications. The building was completed, and accepted by the hotel company in the presence of their architect and the chairman of the building committee. Subsequently, at an entertainment given at the hotel by the proprietor or lessee, a crowd of persons, some twenty or more, having collected on the porch, a girder, which in part supported it, gave way, the porch fell, and by reason thereof the plaintiff (a guest at the hotel) was injured. He brought this suit in the court below against the contractor, to recover damages for the injury he thus sustained, with the result of a verdict in his favor for \$4,000.

Upon the trial, the defendant asked the court below to instruct the jury that "if Somerset, the defendant, was the contractor for the erection of the hotel in question, for the Sea Isle City Hotel Company, the owner, and after completion delivered possession of it to the said Sea Isle City Hotel Company on June 30, 1888, which company accepted it, and if the accident in question happened after June 30, 1888, and while said owner or his lessee was in possession, then the plaintiff is not entitled to recover against the defendant." See first assignment. This point was refused, and it fairly presents the important question in the case.

The contention of the plaintiff is that the accident was caused by the defective construction of the porch; that it was not according to the plans and specifications called for by the contract; that timbers inferior in size and quality to those called for by the plans were used; that these defects were not observable after the building was completed, and, in point of fact, were unknown to the company when it accepted the building from the contractor.

We must assume these allegations as substantially found by the jury, and the question arises, what is the responsibility of the contractor under such circumstances? That he would be

responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications, may be conceded. There was a contractual relation between them, and for breach of a contract, not known to and approved by the company, he would be liable. Is he also liable for an injury to a third person not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty, — the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that because A. is not responsible for an accident B. or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this State. The true rule, which we think applicable to it, may be found in Wharton on Negligence, 2d ed. § 438. It is as follows: — “There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. . . . Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and, after he has finished his work and it has been accepted by the city, a traveller is hurt when passing over it by a defect caused by the contractor’s negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveller in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to

suits. But a better ground is that there is no causal connection between the traveller's hurt and the contractor's negligence. The traveller reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveller. The traveller, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveller intervened the city, an independent, responsible agent, breaking the causal connection."

In § 438, the same learned author refers to the case of a contract with the postmaster-general to furnish certain roadworthy carriages; and after the delivery of the carriages the plaintiff is injured in using one of them, by reason of the carriage having been defectively built.

"No doubt," says Mr. Wharton, "had the carriage been built for the plaintiff, he could have recovered from the contractor. But there is no confidence exchanged between him and the contractor; and between them breaking the causal connection, is the postmaster-general acting independently, forming a distinct legal center of responsibilities and duties." This rule is distinctly recognized in *Winterbottom v. Wright*, 10 M. & W. 115. *Francis v. Cockrell*, L. R. 5 Q. B. 501; *Heaven v. Pender*, 11 Q. B. 503; *Collis v. Selden*, L. R. 3 C. P. 495; and other English cases, recognize the doctrine that in such instances there is no duty owing from the contractor to the public. As was said by Martin, B., in *Francis v. Cockrell*, *supra*: "The law of England looks at proximate liabilities as far as possible, and endeavors to confine liabilities to the persons immediately concerned." In *Losee v. Clute*, 51 N. Y. 494, it was held that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction; and if, after delivery to and acceptance by the purchaser, and while in use by him an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer.

We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In *Godley v. Hagerty*, 20 Pa. 387, the builder was the owner, and he was properly held responsible for an inherent weakness in the building by which

an accident occurred. In *Carson v. Godley*, 26 Pa. 111, the warehouse was erected under the personal superintendence of the owner, and having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building, in consequence of its insufficiency for the purpose for which it was erected and leased. In *Thomas v. Winchester*, 6 N. Y. 397, the court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labelled to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer.

We need not pursue the subject further. We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason. The consequences of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, a piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine or his steamships shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned. We are of the opinion that the defendant's first point should have been affirmed. So, also, his second point, which asked for a binding instruction in his favor.¹ . . .

¹ (*Heizer v. Kingsland Co.*, 110 Mo. 605; 46 A. L. J. 53, *accord.*) In *Schubert v. J. R. Clark Co.*, 49 Minn. 331, the plaintiff recovered in tort against the defendant, for personal injuries sustained while using a step-ladder, which had been manufactured by defendant and sold to a retail dealer who sold it to plaintiff's employer. "It was made of poor, cross-grained and decayed lumber and was so insufficient in strength as to be dangerous to the life and limb of this plaintiff and whoever might use the same," and "the dangerous defects were concealed by the application of oil, paint and

PURTELL v. JORDAN.

(156 Mass. 573. — 1892.)

KNOWLTON, J. There was evidence from which the jury might have found that the injury to the plaintiff was caused by the negligence of the defendants' servant in driving too fast, when, by reason of the gathering darkness, and the close proximity of the high loaded team, he was unable to see whether any one was on the crossing, about to pass immediately before him. The jury might also have found that the plaintiff was using such care as persons of ordinary prudence are accustomed to exercise under like circumstances. The court rightly refused to order a verdict for the defendants. The defendants requested the presiding justice to instruct the jury as follows: "That if the plaintiff, standing where he was on Harrison avenue, could not, before he attempted to cross the street, by reason of the position and movement of the large team, see vehicles coming down Harrison avenue and approaching Oak street, he was not in the exercise of due care in attempting to cross the street until such obstacle to his view was removed." "If, when the plaintiff started to cross Harrison avenue, he could not see defendants' team approaching by reason of the position of the large team, and attempted to cross so closely to the rear of the large team that he could not

varnish, although . . . not applied for the purpose of concealing such defects." "When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered. It must have been deemed probable that any intervening dealer would not discover the defect, and that nothing would be likely to occur to avert the danger to which the person who might use the ladder would be subjected by the defendant's negligence. Hence it would be difficult to distinguish such a case in principle from one where the transaction is directly between the wrong-doer then knowing the danger, and the party who is injured. . . . We consider that in principle the defendant should be held to responsibility for an injury resulting proximately, and without any intervening, wrongful agency, from its confessedly negligent act which was such as to expose another to great bodily harm; and that no reason of policy forbids."

- see defendants' team approaching until he got by the large team, he was not in the exercise of due care." It is urged in behalf of the defendants that it is always negligent for a pedestrian in the streets of Boston to attempt to cross behind a high loaded team until the team has passed so far as to enable him to see that no other team is coming from behind it on the other side. We cannot lay this down as a legal proposition. (*Bowser v. Wellington*, 126 Mass. 391; *Shapleigh v. Wyman*, 134 Mass. 119.) The circumstances of different cases so vary, and the natural and usual methods of crossing our crowded streets are so affected by facts and influences which are difficult of statement, and which are seldom found twice in the same combination, that there are few rules of law which can be arbitrarily laid down in reference to the effect of particular acts. When a pedestrian is run over by a team on a street, the question whether there was negligence on his part, or on the part of the driver of the team, or on the part of both of them, is usually a question of fact to be decided by the jury. One passing behind a loaded team which obstructs his view has no such reason to apprehend danger from a team driven in the opposite direction, when he hears nothing, as he would have if he were crossing over one track of a railroad to another on which a rapidly moving train might be coming. Of course he should take precautions, and endeavor to ascertain whether he is exposing himself to danger. But, in view of the rate of speed at which horses are ordinarily driven in crowded streets, and the control which is usually exercised over them, to determine what precautions are necessary to prevent being run over is commonly a matter of fact, and not of law. We are of opinion that the instructions requested were rightly refused.

COPELAND v. DRAPER.

(157 Mass. 558. — 1893.)

HOLMES, J. *Horne v. Meakin*, 115 Mass. 326, the case relied on by the plaintiff, only decides that, if a party negligently furnishes an unsuitable horse, it is not a defence that he did not know that this horse was unsuitable. In the case at bar, negligence was excluded by the plaintiff's admission that there was no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the horse was unsuitable, if in fact it was. Therefore in order to recover, the plaintiff must maintain that a livery stable keeper warrants or insures the suitability of every horse which he lets.

No such liability is imposed on him by the fact that he follows a common calling, any more than it is upon every man who keeps a shop. Even in old times, the exercise of a common calling only required a man to show skill in his business. (Fitzh. Nat. Brev. 94, D; *Norris v. Staps*, Hob. 210b, 211; 3 Bl. Comm. 164; *Rex v. Kilderby*, 1 Wms. Saund. 311, 312, note 2.) Common carriers were insurers, not because they had a common calling, but because they were bailees, coupled with certain gradual changes in the law, not material here.

If it should be sought to charge the defendant for the horse as for a dangerous animal, the liability for a horse on that ground, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency. (*Com. v. Pierce*, 138 Mass. 165, 179; *Dickson v. McCoy*, 39 N. Y. 400, 403. See, also, *Hawks v. Locke*, 139 Mass. 205, 208.) The suggestion has been made, following Mr. Justice Story's statement of the doctrine of Pothier, that bailors for hire generally warrant the suitability of the thing let, *Harrington v. Snyder*, 3 Barb. 380, 381; Story, Bailm. §§ 383, 390; but the common law in general applies the principle of *caveat emptor* when the hirer has examined the article, (*Cutter v. Hamlen*, 147 Mass. 471, 475. See, further, *Hawks v. Locke*, *ubi supra*; *MacCarthy v. Young*, 6 Hurl. & N. 329.)

The supposed warranty, if it existed, could not be placed on

any of the foregoing considerations, but would have to stand on the analogy of carriers of passengers, taking their liability in the strictest form in which it ever has been taken. There have been intimations, if not decisions, in favor of such a view with regard to vehicles let for the known purpose of carrying passengers, (*Jones v. Page*, 15 Law T. (N. S.) 619; *Leach v. French*, 69 Me. 389, 392; *Harrington v. Snyder*, 3 Barb. 380; *Kissam v. Jones*, 56 Hun, 432, 434, 10 N. Y. Supp. 94. Compare *Francis v. Cockrell*, L. R. 5 Q. B. 501, 503; *Fowler v. Lock*, L. R. 7 C. P. 272, L. R. 9 C. P. 751, note, L. R. 10 C. P. 90;) but an opposite decision was reached in *Hadley v. Cross*, 34 Vt. 586, and in this Commonwealth even carriers of passengers do not warrant their vehicles, and are not liable if wholly free from negligence, (*Ingalls v. Bills*, 9 Metc. 1; *White v. Railroad Co.*, 136 Mass. 321, 324; *Readhead v. Railway Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.) It follows, *a fortiori*, that one who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care. See Story, Bailm. § 391 *a*; Edw. Bailm. § 373.

Judgment on the verdict.

SECTION 2. EVIDENCE OF NEGLIGENCE.

GAVETT v. M. & L. RY. CO.

(16 Gray, 501. — 1860.)

J. W. May for the plaintiff.*B. F. Thomas* for the defendants.

BIGELOW, Ch. J. The line which marks and separates the respective duties and functions of the court and jury is certain and well defined. The difficulty arises in determining on which side of this line particular cases fall; that is, in deciding whether a case presents only a question of law, or involves an inquiry into facts and the inferences deducible from them. Certainly the court in all cases should be scrupulously careful not to invade the province of the jury by undertaking to decide on the weight or effect of evidence, or by refusing to submit to their consideration any question of fact, material to the issue, which may be in dispute between the parties. On the other hand, it is the clear duty of the court to decide on the legal effect of the evidence, and to say whether it is such as to entitle a party to the verdict; otherwise the jury might be called on to decide a pure question of law. It may be said generally that it is the duty of the judge to decide whether there is any evidence; of the jury to determine upon its sufficiency. This may be illustrated by an example. Suppose the facts of a case were stated in the form of a special verdict in favor of a plaintiff. This would be supported if the facts so found comprehended all the material averments necessary to maintain the action. But if upon them, with all possible inferences which reasonable men might draw therefrom, there was an absence of an essential element which it was incumbent on the plaintiff to establish, there can be no doubt it would be the plain duty of the court to say, as a matter of law, that he had failed to maintain his action. In like manner, when the evidence offered by a party wholly fails to prove a material allegation, it is the province of the court to decide that no case is proved which can in law support a finding in his favor.

In such case, the testimony furnishes nothing for the consideration of the jury, and it is as much the duty of the court to determine that there is no evidence to sustain the action, as to exclude evidence on the ground of its irrelevancy. If, however, there is a dispute upon the facts, or the credibility of witnesses is drawn in question, or a material fact is left in doubt by the testimony, or there are inferences to be drawn from the facts in proof, then it would be proper to submit the case to the consideration and determination of the jury. (*Company of Carpenters v. Hayward*, 1 Doug. 374; *Mitchell v. Williams*, 11 M. & W. 216; *Doyle v. Wragg*, 1 Fost. & Finl. 7; *Stormont v. Waterloo Life & Casualty Assurance Co.*, 1 Fost. & Finl. 22; *Sawyer v. Nichols*, 40 Maine, 216.)

In the case at bar there is no dispute about any of the material facts upon which the plaintiff rests her claim to damages. If there is any discrepancy in the statements of the witnesses, the points of difference do not change in any degree the legal aspect of the case. The plaintiff not only failed to offer any evidence of ordinary care on her part at the time of the occurrence of the accident, but it appears, on the testimony adduced by her in support of her case, that she was guilty of negligence, which contributed to produce the injury of which she complains. One of two facts is established by the proof. After the train had started and was in motion, the plaintiff either passed out of the door and was on the platform of the car for the purpose of attempting to leave it, or she actually stepped from the platform of the car upon that in front of the station. While thus situated, she was thrown down and injured. It was therefore her attempt to leave the train, after it was in motion, that directly tended to bring about the casualty which occurred. Now it cannot be doubted that the well-known hazards of transportation on railroads, and the unprotected and exposed situation of persons standing on the platform of the car, or attempting to leave it when the train is about to start or is actually in motion, render it unsafe for passengers to place themselves in such a situation, and preclude the idea that due care can be exercised under such circumstances. In the absence of anything to create excitement or cause alarm, the attempt to leave

a car, while the train is in motion, by passing to the outside or stepping off, is *prima facie* evidence of carelessness. So it was decided to be by the court in *Lucas v. New Bedford & Taunton Railroad*, 6 Gray, 64, in which it was held that the plaintiff was wanting in ordinary care in attempting to leave the cars when they were in motion.¹

CLAFLIN v. MEYER.

(75 N. Y. 260. — 1878.)

A. R. Dyett for appellant.

Wm. H. Arnoux for respondents.

HAND, J. The counsel for the respondents is correct in his position that the question of burden of proof is the material one upon this appeal. For the evidence is such that if it were incumbent upon the defendant to prove himself free from all negligence causing or attending upon the burglary, and not merely to leave the case as consistent with due care as with the want of it, it is clear that the judgment, so far as it adjudges his liability for the goods, must be affirmed, as we cannot say that such proof of a conclusive character was given. But the law, as to the burden of proof, is pretty well settled to the contrary. Upon its appearing that the goods were lost by a burglary committed upon the defendants' warehouse, it was for the plaintiffs to establish affirmatively that

¹ In *Burrows v. Erie Ry. Co.*, 63 N. Y. 556, Rapallo, J., says (p. 559): "The cases in which a recovery has been allowed, notwithstanding that the passenger undertook to leave a car while in motion, are exceptional and depend upon peculiar circumstances," citing *Penn Ry. Co. v. Kilgore*, 32 Penn. St. 292, where train started while plaintiff was alighting, and *Filer v. N. Y. C. Ry. Co.*, 49 N. Y. 47, where defendant's brakeman advised plaintiff to get off, as "they are not going to halt any more." The Alabama Supreme Court held in *M. & E. Ry. Co. v. Stewart*, 43 A. L. J. 485; 8 So. R. 708 (1890) that plaintiff could recover where he boarded a moving train upon the conductor's crying "All aboard!" See, also, *Renner v. Ry. Co.*, 46 Fed. R. 344, and authorities cited.

such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the warehouseman.

The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them, or account for such non-delivery, or, to use the language of Sutherland, J., in *Schmidt v. Blood*, where "there is a total default in delivering or accounting for the goods" (9 Wend. 268), this is to be treated as *prima facie* evidence of negligence. (*Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; *Steers v. Liverpool Steamship Co.*, 57 id. 1; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184.) This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. (*Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271, and cases there cited; *Schmidt v. Blood*, 9 Wend. 268; *Platt v. Hibbard*, 7 Cow. 500, n.) Grover, J., in 46 N. Y. *supra*, says, in delivering the opinion of the court, the question is "whether the defendant was bound to go further (*i.e.* than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs to maintain the action to prove that the fire causing the loss resulted from such negligence." And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction and that this was contrary to the law and erroneous. So Sutherland, J., in 9 Wend. *supra*, in the case of a warehouseman, says the *onus* of showing the negligence

“seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods.” And he cites a note of Judge Cowen to his report of *Platt v. Hibbard*, 7 Cow. 500, in which that very learned author says, criticising and questioning a charge of the circuit judge, “the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie (*Anonymous*, 2 Salk. 655); but when he has shown a loss, or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff.”

It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging, as an excuse, that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real “shifting” of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must in *all cases*, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman, and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from the defendants' warehouse by a burglarious entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary.

Examining the case under this rule of law we find that there was no proof tending to show when the warehouse was entered, whether in the night or daytime. It was, it seems, during a large portion of every twenty-four hours in the custody of the government janitors. It does not appear nor is it found whether access to the warehouse was gained through the scuttle or roof or by the ordinary entrances, whether the thieves got in by stealth and broke *out* through the roof or broke *in* through the roof. The evidence was clear that access to the roof was gained from an adjoining tenement house by means of a burglar's ladder, and a blank brick wall rising some twenty or twenty-five feet above the roof of the tenement house was scaled by means of this ladder; that the goods were removed from the third story of the warehouse where they were stored, the packages being carefully replaced so as to delay observation and discovery, and the marks removed from the goods in an upper room of the tenement house, hired probably by the thieves for the purpose.

The plaintiffs rested their case upon the pleadings, without proving any demand or refusal, admitting a "robbery," but not attempting to show any negligence in the defendant.

The motion for dismissal of the complaint then made by the defendant on the ground that no negligence had been shown, that there was no evidence of refusal to deliver, and the burden was still upon the plaintiffs, should, I think, have been granted; and its denial may perhaps explain the subsequent finding by the referees.

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*Judgment reversed.*¹

¹ Cf. *Stokes v. Saltonstall*, 13 Pet. 181, holding that the facts that a stage-coach was upset and plaintiff, a passenger, was injured, make out a *prima facie* case of negligence.

At common law one injured in person or property by a common carrier may sue on contract or in tort at his option. (*B. C. P. Ry. Co. v. Kemp*, 61 Md. 619; 48 Am. R. 134; *Nevin v. P. & Co.*, 106 Ill. 222.) Under the New York code an action for damages against a common carrier, whether in form *ex contractu* or *ex delicto*, is barred after three years. (*Webber v. H. & Co. Ry.*, 109 N. Y. 311; 15 N. Y. S. R. 262; 16 N. E. 358; *Maxson v. D. L. & W. Ry. Co.*, 112 N. Y. 559; 20 N. E. 544. Cf. *Flemming v. M. S. & L. Ry.*, 4 Q. B. D. 81, and Pollock on Torts, p. 437.)

SEYBOLT v. THE N. Y. L. E. & W. RY. CO.

(95 N. Y. 562. — 1884.)

Lewis E. Carr for appellant.

J. F. Seybolt for respondent.

RUGER, Ch. J. The cause of the accident, whereby the plaintiff's intestate lost his life, was left in some doubt by the testimony, and was altogether a matter of inference for the jury to draw from the circumstances appearing in evidence relating thereto.

No direct evidence was given on the subject by either party, the defendant seeking to establish the inference that it was occasioned by the breaking of an axle by proving from the evidence of its employees and others that the axle of the engine was found broken after the accident, and that its switches were properly set; that the road-bed and machinery of the train were of sound material, in good order and condition, and that the train was carefully and skilfully managed; and the plaintiff, from the nature of the accident, the results produced and the circumstances surrounding it, that it was occasioned by the negligence of the defendant's servants in setting the switches at the place of accident, whereby the train was diverted from the main track and brought in collision with obstructions on a side track, which produced the injury complained of. It was undisputed in the case that the casualty occurred in the immediate vicinity of the switch; that the cars left the main track, following either upon or in the general line of the side track leading from the switch; that they came in collision with cars standing on the side track at a distance of several hundred feet from the switch, and that the proximate cause of the destruction of the mail car was the collision between the train and the cars standing on the side track. These circumstances afforded a strong presumption that the train was diverted from the main track by some disarrangement of the switch. No adequate cause for the various circumstances appeared in evidence except that afforded by the presumption of a misplaced switch.

Notwithstanding the positive evidence of witnesses to the effect that at different times, during the few hours preceding this accident, they had examined these switches and found them properly set and locked, there was sufficient evidence derivable from the undisputed facts, and the conflicting statements as to the situation of the connecting rails of the side track after the accident, to afford a support for the inference, probably drawn by the jury, that the accident was caused by a misplacement of one or both of the switches. There was evidence tending to show that the mail car was thrown from the side track a distance from thirty to fifty feet down an embankment, and was found to be lying nearly abreast of the engine, at right angles with it, and on fire, immediately after the accident occurred. The situation, not only of this car, but that of the baggage and smoking cars attached to it, was such that it could not probably have been produced except by a collision between a train moving with considerable velocity upon a clear track and a body offering great resistance.

From these facts the jury might very well have concluded that the evidence which attempted to account for the accident, on the theory that the train left the track near the upper switch in consequence of a broken axle, involving as it did the proposition that it must have run nearly four hundred feet over railroad ties and other obstructions before colliding with the cars standing on the side track, was quite improbable, and did not sufficiently account for the results disclosed by other undisputed evidence. There was evidence to support the finding of the jury upon the question of the defendant's negligence, and we see no ground upon which to interfere with the conclusions reached.

At the close of the case the defendant requested an instruction to the jury that "the burden of proof is on the plaintiff to establish the negligence of the defendant. If there is a reasonable doubt on the whole evidence as to the negligence of the defendant, the verdict should be for the defendant." We think the court committed no error in refusing to charge as requested. While it is true, as a general proposition, that the burden of showing negligence on the part of the defendant occasioning an injury, rests in the first instance upon the

plaintiff, yet in an action of this character, when he has shown a situation which could not have been produced except by the operation of abnormal causes, the *onus* then rests upon the defendant to prove that the injury was caused without his fault. (*Caldwell v. N. J. Steamboat Co.*, 47. N. Y. 291; *Edgerton v. N. Y. & Harlem R. R. Co.*, 39 id. 227; *Curtis v. R. & Syracuse R. R. Co.*, 18 id. 534.) It was said by Judge Grover in the *Edgerton Case*: "Whenever a car or train leaves the track it proves that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition, and to operate it with the necessary prudence and care, has in some respect violated his duty." "The court charged that the defendant was bound to show and give some explanation of the cause of the accident. This portion of the charge must be understood in reference to the facts of this case and as applied to such facts. In this view it was not erroneous." (See, also, *The J. Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Mullen v. St. John*, 57 id. 572; *Ginna v. Second Avenue R. R. Co.*, 67 id. 597.) When this request was made the evidence had clearly raised a presumption of negligence against the defendant, and the only question relating thereto which remained for the jury to consider, was whether this presumption had been sufficiently negatived by the evidence introduced by the defendant. Under the authorities cited it would not have been error, even if the court had charged that the plaintiff had established a *prima facie* case, and the burden of explaining the cause of the accident then rested upon the defendant. The request must be considered with reference to all the facts appearing in the case at the time it was made, and as applied to them we do not think the defendant was entitled to the charge requested.

This request was also properly denied for the reason that it was coupled with the proposition that the jury should find for the defendant if they entertained a reasonable doubt upon the whole evidence as to the negligence of the defendant.

We are not aware of any rule applicable to the trial of issues of fact in civil actions which requires a party upon whom the

burden of proof rests to establish a case free from reasonable doubt. In criminal cases the law, out of tender regard for the rights of accused persons, and the presumption of innocence which always attaches to persons in that situation, gives to the defendant the benefit of any reasonable doubt existing as to his guilt; but in civil actions, unless the issue involves the commission of a crime by some of the parties thereto, the application of such a rule is, we think, unauthorized by the law of evidence.¹

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Judgment affirmed.

SECTION 3. CONTRIBUTORY NEGLIGENCE.

MARTIN *v.* W. U. Ry. Co.

(23 Wis. 437. — 1868.)

Fuller & Dyer for appellant.

C. N. Parsons for respondent.

DIXON, Ch. J.

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The only remaining question is as to the alleged negligence of the plaintiff in permitting about one-fourth of a pane of glass to be out of the window of her house, through which the sparks are supposed to have passed and set fire to the clothing upon the inside. It does not appear when the glass was broken, or that the plaintiff knew it before the time of the fire. But suppose it had been broken for a long time, and the plaintiff knew it, it is but an exceedingly slight cir-

¹ The explosion of a steam-boiler lawfully in operation on A's premises, whereby B's premises are damaged, does not warrant the inference of negligence. (*Losee v. Buchanan*, 51 N. Y. 476.) Some authorities make a distinction between cases where a contract relation existed between the parties, and those where it did not exist. (*Cosulich v. S. O. Co.*, 122 N. Y. 118; *Huff v. Austin*, 46 Ohio St. 386.) A person who has put steam apparatus into a building is not liable for damages caused by its explosion, without proof that he has failed to use ordinary diligence and skill. (*Reiss v. N. Y. Steam Co.*, 28 N. E. 24; 44 A. L. J. 135 (N. Y. App. 1891).)

cumstance upon which to base the charge of negligence against her so as to prevent a recovery. The burning happened at a warm season of the year, when it is customary for most people, and convenience and comfort require them, to keep the windows of their houses wholly or partially open. Suppose, in such case, that the plaintiff's window had, according to the general custom, been open, and the sparks had entered in that way, would it have been such a careless or improper use of her house as would have defeated the action? Are the occupants of adjacent dwellings required to exercise so much care to prevent accidents of this nature happening from trains passing at an unlawful rate of speed, that they must, contrary to common usage, keep the windows closed when it would otherwise be most convenient and comfortable to have them opened? It seems clear to us that both these questions must be answered in the negative; and if they are, then the question here presented must also receive a negative answer. If it would not have been negligence in the plaintiff to have had the window open at the time, it clearly was not that a small part of a pane of glass was gone, and that she had neglected to have it replaced.

It follows from these views that the judgment must be affirmed.

*By the court, judgment affirmed.*¹

¹ Whether the plaintiff must show his freedom from negligence, as well as defendant's negligence, in order to make out a case, depends upon the jurisdiction in which he sues. In New York he must; but the courts are careful to say: "It must not be understood that it is incumbent on the plaintiff, in the first instance, to give evidence for the direct and special object of establishing the observance of due care; it will be enough if the proof introduced of the negligence of defendants and the circumstances of the injury *prima facie* establish that the injury was occasioned by the negligence of the defendants." (*Button v. H. R. R. Co.*, 18 N. Y. at p. 252. Cf. *Tolman v. S. B. & N. Y. Ry. Co.*, 98 N. Y. 198.) In Pennsylvania the courts hold that there is a presumption that an injured person has done all that a prudent man would do in the circumstances to save himself from injury. (*Weiss v. P. Ry. Co.*, 79 Pa. St. at p. 390.)

Contributory negligence will not defeat the plaintiff in admiralty, unless his fault is wilful, gross or inexcusable. (*The Max Morris*, 137 U. S. 1.) Whether the plaintiff should recover exactly one-half of his damages, or his recovery should be fixed at more or less in the discretion of the court, is left undecided by the Supreme Court, although the district judge award one-half damages.

SMITHWICK v. HALL.

(59 Conn. 261. — 1890.)

TORRANCE, J. The general question reserved for our advice in this case is whether the plaintiff, upon the facts found, is entitled to the substantial damages or only to the nominal damages found by the court below. Inasmuch as that court has expressly found that the negligence of the defendant caused or contributed to the injury for which the plaintiff seeks to recover, the decision of the above general question depends upon this single point, namely, whether the acts and conduct of the plaintiff, as set forth upon the record, constitute or amount to such contributory negligence on his part as will bar his right to substantial damages. The facts found, so far as they bear upon the question for decision, are in substance the following: The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood upon a platform about 5 feet wide and 17 feet long, raised 15 feet above the ground, and extending from the west side of the building easterly to a point about 2 feet east of the door or aperture through which the ice was taken into the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door, and served as a protective railing or guard to that portion of the platform. In front of the door, and east of it, the platform was without guard or railing of any kind. A short time prior to the injury the foreman of the defendant stationed the plaintiff on the platform just west of the door, and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform, and the liability by inadvertence to misstep or fall or slip off, the latter being aggravated by the liability of the platform to become slippery from broken

ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation. After the foreman went away the plaintiff, in spite of the orders so given to him, and for reasons of his own apparently, went over to the east end of the platform, and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow-workmen, seeing the plaintiff in that place, told him that "it was not safe, and to stand on the other side," but the plaintiff, notwithstanding such warning, remained at work there. While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform, and thence to the ground. The plaintiff was struck by portions of the descending mass, and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse. Most of the injuries which he actually sustained were occasioned by the fall. The plaintiff had no knowledge that the wall would be likely to fall, or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard." In contemplation of the peril from the falling wall, it is found that "the spot where the plaintiff stood could not have been considered more dangerous than the place where he was directed to stand, though in fact most of the brick fell upon the side where he stood, and the result demonstrated, therefore, that the other side would have been safer in the event which occurred."

Upon these facts the defendant contends that the plaintiff, in going to and remaining on the east end of the platform, contrary to the orders and in spite of the warning given him, and in view of the obvious and manifest danger in so doing, was guilty of such contributory negligence as bars him of his right to recover more than nominal damages. If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow-

workman warned him, then this claim of the defendant would be a valid one. But upon the facts found it is without foundation. The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe, and would not be likely to fall upon him, no matter where he stood on the platform. He had no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this, in turn, presupposes knowledge or its legal equivalent. With respect to that danger, the plaintiff, upon the facts found, must be held to have acted as any reasonably careful man would have acted under the same circumstances. In changing his position contrary to orders, he voluntarily took the risk of all perils and dangers which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the defendant's negligence from other sources, — dangers which he was not bound to anticipate and of whose existence he had no knowledge, — he took no risk and assumed no duty of taking care. It was the duty of the defendant, on the facts found, to warn the plaintiff against the danger from the falling wall. Now, the act or omission of a party injured, which amounts to what is called "contributory negligence," must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause, or one of the proximate causes, and not merely as a condition. In the case at bar the conduct of the plaintiff, as we have seen, was, with respect to the danger from the falling wall, not negligent, for the want of knowledge or its equivalent on the part of the plaintiff. Nor was his conduct, legally considered, a cause of the injury. It was a condition, rather. If he had not changed his position, he might not have been hurt. And so, too, if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth, or his not remaining at home that day, can in any just or legal sense be deemed a cause of the

injury. The court below has found that the plaintiff's fall in the position in which he stood was due to the giving way of the wall, and that most of his injuries were occasioned by the fall. His position there, upon the facts found, can no more be considered as a cause of the injury, than it could be in a case where the defendant, in doing some act near the platform without the plaintiff's knowledge, had negligently knocked him to the ground, or had negligently hit him with a stone. Had the injury been occasioned by a misstep or slip from the platform by the carelessness of the plaintiff, or for the want of a railing, the casual connection between the change of position and the injury would, legally speaking, be quite obvious; but, from a legal point of view, no such connection exists between the change of position and the giving way of the wall.

The plaintiff had full knowledge of and was abundantly cautioned against certain particular sources of peril and danger, and he voluntarily neglected the warnings and took the risk of those perils and dangers. He was injured through the negligence of the defendant from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the defendant to warn him. Under these circumstances, the failure or neglect to heed the warning does not constitute contributory negligence. (*Gray v. Scott*, 66 Pa. St. 345.) In the case cited certain boys had been warned not to play at a certain point because of some particular and obvious dangers existing there. They failed to heed the warning, and one of them, playing at that place, was killed. His death was caused by the negligence of another, and came from a source of danger not obvious, and entirely different from any the boys had been warned against. In answering the argument that the boy's failure to heed the warnings was a cause of his death, and contributory negligence, the court say: "But because he was under the tramway in the passage below, it is thought he was guilty of contributory negligence. He could not be guilty of negligence as to the defendant without there was some reason to expect danger, and a duty of care on his part in relation to it. There was ordinarily none. He had a right, therefore, to suppose everything secure and safely managed on the tramway, and because it was not he was killed. Precisely the

same argument could have been used if the boy had been killed in that place by the negligent use of fire-arms discharged a hundred yards off." The defendant seems to claim, however, that, although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall; and that, as he probably would not have fallen had he remained behind the railing, he contributed to his injury by placing himself where, in case of such accident, there was nothing to prevent his fall. Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal standpoint, a contributing cause when it was but a condition. And if the claim means that the plaintiff by his act increased the injury merely, then, if this were true, it would not be such contributory negligence as would defeat the action. To have that effect it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though, of course, it may affect the amount of damages recovered in a given case. (*Gould v. McKenna*, 86 Pa. St. 297; *Stebbins v. Railroad Co.*, 54 Vt. 464.) This claim, however, on the facts found, is wholly without foundation. The plaintiff is entitled to judgment in his favor for \$1,000, and the Superior Court is so advised. In this opinion the other judges concurred.

PENNSYLVANIA CO. v. LANGENDORFF.

(48 Ohio St. 316. — 1891.)

BRADBURY, J. The defendant in error, in June, 1885, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl

about four years old. The plaintiff in error had constructed a safety-gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travellers. The accident that caused the injury occurred about 7 o'clock in the evening, or a little later, but while it was yet light. The watchman had finished his day's labor, and gone away, and the gate was raised, (or open,) though the street was, perhaps, as extensively used at that hour as at any other part of the day. A local freight train was past due, and approaching at a higher rate of speed than that prescribed by the ordinances of the city. The defendant in error and the nurse were engaged in conversation at a point from which the approaching train was in view for a considerable distance, though exactly how far away it could be seen is left in some doubt. The little girl, while her nurse and defendant in error were conversing, wandered across the railroad track, and, seeing or hearing the approaching train, became excited by the sight or noise or both, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and, probably, that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains. That the safety-gate was raised, and the watchman absent, was not disputed at the trial, so far as the record discloses; and the evidence is amply sufficient to warrant the jury in finding that the train was being run at an unlawful rate of speed, so that in both these particulars the negligence of the railroad company was established. . . .

This brings us to the consideration of the main question. Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train

to rescue a child who had fallen in front of it ; therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court : “ It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the railroad company responsible in damages for this injury it must be shown (1) that the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the railroad company ; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. . . . If you find that the peril to which the child was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. . . . If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort.” Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent ; and that, however commendable his conduct may have been when viewed from the stand-point of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to

rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some States, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing, and the unlawful rate of speed at which the train was running towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done suggests that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority.

In *Railway Co. v. Hiatt*, 17 Ind. 102, language is used by the judge in deciding the case, which, to some extent, supports the

doctrine, but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obiter dictum*. The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In *Eckert v. Railway Co.*, 43 N. Y. 502, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri. (*Linnehan v. Sampson*, 126 Mass. 506; *Donahoe v. Railway Co.*, 83 Mo. 560; Beach, Contrib. Neg. § 15, p. 45; Whart. Neg. § 314; Pierce on Railroads, 329.) The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in other courts. (*Carroll v. Railroad Co.*, 14 Minn. 57; *Penn. Co. v. Roney*, 89 Ind. 453; *Cottrill v. Railway Co.*, 47 Wis. 634.) We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the rescue whether the act was rash or not, and in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty.

Judgment affirmed.

MENDER v. LAUER.

(55 N. J. L. 205. — 1893.)

DEPUE, J. This was an action to recover damages for an injury done to a surveyor's instrument, known as a "transit," consisting of a telescope, compass, Vernier's scales, etc., mounted on a tripod, and standing, when set up in position, about five feet high. The declaration alleges that the plaintiffs were using the instrument upon a public highway, and that the defendant was driving along the said highway, and then and there did drive his horse and wagon so carelessly, negligently, and unskillfully that by his carelessness, negligence, and want of skill the said instrument was run into, and was thereby greatly damaged. At the trial the court nonsuited the plaintiffs on two grounds: (1) That there was no proof of negligence on the part of the defendant; and (2) that the plaintiffs were guilty of contributory negligence in exposing the instrument to danger by leaving it standing in the public highway.

The place where the occurrence happened was in Orient street, in the town of Rutherford. The street is 100 feet wide, with a roadway for vehicles 60 feet wide, from curb to curb, with a strip of macadam 15 feet wide in the middle of the roadway. The instrument was in charge of Worthington N. Jacobus, an employee of the plaintiffs, who, with two assistants, was engaged in surveying a plot of ground situated on the southerly side of the street. The instrument was set up in the middle of the street. One of the assistants was sent with a brush hook to clear away some bushes growing on the plot to be surveyed. Worthington and his other assistant were engaged at the side of the street, along the front of the plot, attending to the details of the work required to be done there. The instrument meanwhile was left standing in the middle of the road, without any one to look after it. The instrument had been left thus standing in the road about five minutes when the defendant came along in his wagon, and ran into it. The shaft of the wagon, coming between the legs of the instrument, pushed it over, and injured it. The defendant was driving slowly. He

stopped his horse and turned around, immediately after the mishap, and said he did not notice the instrument. There was no contention on the part of the plaintiffs that the defendant's act was willful, and the only proof of negligence was that at the time of the collision, as he was driving along, he was looking at some houses then being built on the side of the street, for the roofing of which he had contracted; that he was driving along at a slow pace, looking at the roofs to see whether the slaters were getting them finished. Worthington testified that, while setting up the instrument, he noticed the defendant down the road, but at that time he did not notice that the defendant was coming on, and that, not having occasion afterwards to look at the street, the witness did not know that the defendant was coming up the street towards him; that, when the witness saw the defendant, he was about 500 feet from the place where the instrument was set.

The instrument, standing in the travelled way of a public street, was a nuisance. It was left standing in that place without any one in charge to look after it, and warn persons lawfully using the public street of its presence there; and Jacobus knew that the defendant was in the street, with his horse and wagon, and might have occasion to pass that part of the street. It was an act of negligence in Jacobus to leave the instrument in the street, without any one to look after it and care for it.

To sustain the plaintiffs' right to recover damages notwithstanding the instrument was negligently exposed to liability to injury in the manner in which this injury was received, counsel rely upon the much-canvassed case of *Davies v. Mann*, 10 Mees. & W. 546, and *Radley v. Railway Co.*, 1 App. Cas. 754. The earliest case in which the doctrine of contributory negligence as a bar to an action was clearly expressed is *Butterfield v. Forrester*, 11 East, 60, decided in 1809. The suit was against the defendant, who had placed an obstruction in the highway, by means of which the plaintiff, who was riding along the road, was thrown from his horse and injured. The plaintiff was riding violently, and did not observe the obstruction. At the trial, Bayley, J., directed the jury that if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant,

which they accordingly did. In denying a new trial, Lord Ellenborough, in the King's Bench, tersely stated the principle in these words: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action. An obstruction in the road, and no want of ordinary care to avoid it on the part of the plaintiff." The rule of law laid down in *Butterfield v. Forrester* was expressly approved in *Bridges v. Railway Co.*, 3 Mees. & W. 244; and in *Davies v. Mann*, Baron Parke said: "This subject was fully considered by the court in *Bridges v. Railway Co.*, where it appears to me the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovery must be such as that he could, by ordinary care, have avoided the consequence of the defendant's negligence." The facts appearing in *Davies v. Mann* were these: The plaintiff, having tethered the forefeet of the donkey, turned it on the public highway. The roadway was eight yards wide. At the time the donkey was injured it was grazing on the side of the road, and the defendant's team, coming down a slight descent at a smartish pace, ran against it, and knocked it down. The driver of the wagon was then some little distance behind the horses. In commenting upon the charge of the trial judge, Baron Parke said: "The judge simply told the jury that the mere fact of negligence in leaving the donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury, and that, if they were of opinion that it was caused by the fault of the defendant's servant, . . . the mere fact of putting the ass upon the road would not bar the plaintiff of his action." On this assumption the court held that as the defendant might, by proper care, have avoided injuring the animal, he was liable for the consequence of his negligence, though the animal may have been improperly there. *Davies v. Mann* was decided upon the distinction between a faulty act of the plaintiff, remotely connected with the injury, and his negligence as a proximate cause; taking "proximate" in its legal sense, as signifying closeness of causal connection. (*Kuhn v. Jewett*, 5 Stew. Eq. 648.)

Cases in the line of decision with *Davies v. Mann* simply apply to the plaintiff's conduct, as well as to the defendant's,

the maxim, "*Causa proxima non remota spectatur.*" In a collision case, where the tug injured took a course in the direction which gave occasion for a collision with the defendant's steamer, Lord Chancellor Selborne, in the House of Lords, said: "Great injustice might be done, if, in applying the doctrine of contributory negligence, the maxim, '*Causa proxima non remota spectatur,*' were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiff cannot be established merely by showing that if those in charge of the ship had, in some earlier state of navigation, taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence, if it might, in the circumstances which actually happened, have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect." (*Spraight v. Tedcastle*, 6 App. Cas. 217-219.) *Davies v. Mann* was so understood by Lord Campbell in *Dowell v. Navigation Co.*, 5 El. & Bl. 195, 206. In that case the action was by the owner of a collier against the owner of a colliding steamer to recover damages sustained by a collision. The collier was in fault, in that it did not continue to show a light for a reasonable time as it approached the steamer. Lord Campbell, in delivering judgment, said: "The jury must be taken to have found that this fault led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. . . . In a court of common law the plaintiff has no remedy if his negligence, in any degree, contributed to the accident. In some cases there may have been negligence on the part of a plaintiff, remotely connected with the accident; and in these cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted Donkey Case, (*Davies v. Mann.*) There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have

contributed to the accident, within the rule upon this subject; and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed; he, and he only, proximately causing the loss." In that case the rule laid down by the court was that "a plaintiff cannot recover at law for mischief done to his ship by its being struck by defendant's ship, in consequence of the latter being improperly managed, if it appears that such improper management directly contributed in any degree to the accident, however much the defendant may also be in fault, though, if there be negligence on the part of the plaintiff only remotely connected with the accident, the question is whether the defendant, by ordinary care and skill, might have avoided the accident."

Tuff v. Warman, reported in 2 C. B. (N. S.) 740, and in the Exchequer Chamber in 5 C. B. (N. S.) 573; is cited as establishing the general proposition that the plaintiff will not be disentitled to recover if the defendant might, by the exercise of ordinary care on his part, have avoided the consequences of the plaintiff's carelessness. But it will be observed that the instruction of the trial judge, which was approved in both courts, was that "If both parties were equally to blame, and the accident was the result of their joint negligence, the plaintiff could not be entitled to recover; that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he could not recover, however great may have been the negligence of the defendant; but that, if negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might not, by the exercise of ordinary care, have avoided it." In the Common Pleas, Lord Chief Justice Cockburn said: "I think the direction was right, and that the true question in these cases is whether, the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff directly contributed to it. . . . The way in which it was put on the part of the defendant was this: That by his own negligence, in omitting to keep any lookout, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff's negligence would have been directly contributory, and the defend

ant would have been entitled to a verdict." Creswell, J., quoted with approbation the extract above quoted from Lord Campbell's opinion, in *Dowell v. Navigation Co.* Williams, J., after citing the same case, said: "The law was there laid down, in conformity with several previous decisions, that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he cannot recover, however great may have been the negligence of the defendant, but that if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not, by the exercise of ordinary care, have avoided it. So far the doctrine of the cases is perfectly plain." He added: "I dissent entirely from the proposition that the plaintiff is disentitled to recover if his negligence is either proximately or remotely connected with the accident; but I feel great difficulty in dealing with the question whether the negligence was proximate or remote, and certainly feel great difficulty in getting rid of that question of law by leaving it to the jury." In the Exchequer Chamber, as in the court below, the contention of the defendant's counsel was that whether the plaintiff directly or indirectly contributed to the injury was immaterial; if he contributed to it by his negligence at all, he could not recover. In the judgment of affirmance this contention was repudiated, and the instruction of the trial judge was sustained. In the judgment of affirmance in the Exchequer Chamber, Wrightman, J., laid down the rule to be that "the proper question for the jury in this case, and, indeed, in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first case the plaintiff would be entitled to recover; in the latter, not, as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened, nor if the

defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." A reasonable construction of these paragraphs would apply the concluding member of the last sentence to the introductory words of the same sentence, and not extend it so that it should qualify all that is contained in the preceding sentences, especially in view of the prior decisions, and of the charge of the trial judge, which was approved. But in *Radley v. Railway Co.*, 1 App. Cas. 754, 759, Lord Penzance used the following language: "The first proposition is a general one, to this effect: That the plaintiff, in an action for negligence, cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The qualification expressed in the latter opinion, as I have endeavored to show, cannot be considered as supported by *Davies v. Mann*; for, as already said, the court, in that case, in approving the charge of the trial judge, assumed that the mere fact that the donkey was on the roadside was not the immediate cause of the injury. And it is indisputable that if this qualification be accepted literally, as applying in all cases in which the plaintiff's negligence "contributed to cause the accident," the qualification overturns the general rule it purports to qualify, and lays upon the defendant liability for an injury which is the product of the co-operating negligence of both parties. Indeed, in such a case, the person injured is the favored party; for he may recover his damages of the other party if the latter, by the exercise of ordinary care, could have avoided the consequences of the former's negligence. Take the case of a collision between two persons driving on the highway, occasioned by the want of ordinary care by both parties, in which A.'s wagon is broken, and B.'s horse killed, and cross suits for damages are brought. In each case the trial judge

would be required to charge that the plaintiff's negligence, although it contributed to cause the accident, would not disentitle him to a verdict if the defendant, by exercising ordinary care, could have avoided the consequences of the plaintiff's negligence; and the result would follow that B. would be compelled to pay the damages done to A.'s wagon, and would recover of A. the value of his horse. Giving to *Radley v. Railway Co.* the construction the language used in the opinion appears to justify, this case was with good reason sharply criticised by Mr. Thompson. (2 Thomp. Neg. p. 1155, § 7.) Mr. Pollock, after a review of *Radley v. Railway Co.*, in connection with *Tuff v. Warman*, says: "That the true ground of contributory negligence being a bar to recovery is that it is a proximate cause of the injury; and negligence on the plaintiff's part, which is only part of the inducing causes, or," (he adds in a note,) "as Mr. Wharton puts it, is not a cause, but a condition, will not disable him." (Pol. Torts, 378, and note *w.*) If this construction be admissible, the law on this subject, in effect, and except in matter of mere verbiage, is brought to the legal rule adopted by the Queen's Bench in *Dowell v. Navigation Co.*, and by the Common Pleas in *Tuff v. Warman*.

In *Railroad Co. v. Ball*, the suit was by a passenger to recover damages for injury received from a collision of another train with the train in which he was a passenger. The plaintiff at the time of the injury was riding in the baggage car. This court held that if the plaintiff's injuries had been received from the fall of trunks negligently placed, or from being struck by trunks negligently thrown in loading or unloading, or from any other causes incident to the use of that compartment as the place for the carriage of baggage, his negligence in taking a place exposed to such risks would have deprived him of any right to enforce liability on the company for its negligence producing injury from such causes, but that his conduct, even if it be considered as contributing to an injury received from extraneous causes, such as a collision, would not debar his recovery of damages for such an injury. (24 Vroom, 283, 287, 290.) This case is an illustration of the distinction between negligence on the part of the plaintiff so remote from the injury sustained as not to be a cause thereof, and negligence proximately con

tributing to the injury, and in that sense was approved and applied by the Court of Errors and Appeals in *Watson v. Railroad Co.*, *supra*, 125.

In this State the established rule is that if the plaintiff's negligence contributed to the injury, so that, if he had not been negligent, he would have received no injury from the defendant's negligence, — the plaintiff's negligence being proximately a cause of the injury, — he is without redress, unless the defendant's act was a willful trespass, or amounted to an intentional wrong, and in such a case the comparative degree of the negligence of the parties will not be considered. (*Express Co. v. Nichols*, 4 Vroom, 435; *Railroad Co. v. Richter*, 13 id. 180.) In the trial of cases of this kind, where it appears that both parties were in fault, the primary consideration is whether the faulty act of the plaintiff was so remote from the injury as not to be regarded, in a legal sense, as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence, as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not, in a legal sense, a contributory cause thereof, then the sole question will be whether, under the circumstances, and in the situation in which the injury was received, it was due to the defendant's negligence. But if the plaintiff's negligence proximately — that is, directly — contributed to the injury, it will disentitle him to a recovery, unless the defendant's wrongful act was willful, or amounted to an intentional wrong. A court of law cannot undertake to apportion the damages arising from an injury caused by the co-operating negligence of both parties, or to determine the comparative degree of the negligence of each.

In the case in hand the plaintiffs' counsel put his case on *Davies v. Mann*, and especially on *Radley v. Railway Co.*, and contended that no matter if there was negligence on the part of the plaintiff, in leaving the instrument on the highway, he was entitled to recover, if the defendant might have avoided the consequences of that negligence by exercising ordinary care. This contention cannot be sustained. Set up in the roadway, the person in charge of the instrument knew that it was liable to injury from passing vehicles, driven with the utmost care.

He left the instrument exposed to injury without any one to look after its safety, or to warn persons of its presence. His negligence was an immediate, concurring, and co-operative cause of the injury, within the rule which debars a plaintiff from recovering damages for the injury sustained. Nor was there any evidence of negligence on the part of the defendant. In *Davies v. Mann* the defendant's team was being driven "at a smartish pace," without the driver in immediate charge of the team. As construed by Mr. Justice Blackburn in *Radley v. Railroad Co.*, L. R. 10 Exch. 107, the defendant's negligence was "in driving furiously, and in a way which would have been negligent if there had been no donkey there, because he had every reason to expect that other people would have come there." The only evidence tending to show carelessness by the defendant was that, at the time of the collision, he was looking at some houses on the side of the street, to see how the slaters in his employ were getting on with the work. He was driving slowly. The street was unobstructed, except by the plaintiff's instrument. The defendant did not see the instrument, and he had no reason to expect to encounter an obstacle of that, or any other, character. On both grounds the nonsuit was proper, and the judgment should be affirmed.

VICARIOUS NEGLIGENCE.

NEWMAN v. PHILLIPSBURG H. C. RY. Co.

(52 N. J. L. 446. — 1890.)

For the plaintiff, *Messrs. Shipman & Son.*For the defendant, *William H. Morrow.*

BEASLEY, J. There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law.

The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American States this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hatfield v. Rofer & Newell*, reported in 21 Wend. 615. This case appears to have been one of first impression on this subject, and it is to be regarded, not only as the precursor, but as the parent of all the cases of the same strain that have since appeared.

The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to, for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was, that as the child was permitted by its custodian to wander into a position of such danger it was without remedy for the hurts thus received, unless they were violently inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that, consequently, by force of the well-known rule, under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such

infliction is justified in the case cited in this wise: "The infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant; his neglects the infant's neglects."

It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it, the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is, conspicuously, a *non sequitur*. How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in *Wendell* it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to a single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother travelling with a child in her arms should agree with a railroad company, that in case of an accident to such infant, by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds; *first*, the contract would be *contra bonos mores*; and *second*, because the mother was not the agent of the child, authorized to enter into the agreement. Never-

theless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother in the absence of such supposed contract, as would have resulted if such contract should have been made and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself, is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: "The common principle is, that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage." (9 Vin. Abr. 374.) And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him, and the injustice, therefore, of making the latter responsible, in any measure whatever, for the torts of the former, would seem to be quite evident. Such subjectively would be hostile, in every respect, to the natural rights of the infant, and, consequently, cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems rea-

sonable, at least in some degree, that the latter should be enabled to say to the custodian, you and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress; but when such wrong-doer says to the infant, your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone, a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrong-doer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this, an infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being, that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrong-doers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance.

Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow, that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinion, touching the subject just discussed, is in a state of direct antagonism, and it would, therefore, serve no useful purpose to refer to any of them. It is sufficient to say, that the leading text writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tort-

feator by imputation. (1 Shearn. & R. Neg. sec. 75; Whart. Neg. sec. 311; 2 Wood Railw. L. p. 1284.)

In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the Circuit Court be advised to render judgment on the finding of the jury.¹

CHAPMAN v. N. H. RY. Co.

(19 N. Y. 341. — 1859.)

William Curtis Noyes for the appellant.

Henry G. Wheaton for the respondent.

JOHNSON, Ch. J. The collision from which the plaintiff's injury resulted, occurred on the track of the New York and Harlem Railroad Company, between a train of that company and a train of the defendants. The plaintiff was a passenger in the Harlem train, which ran into the defendant's train, both being in motion towards New York. There was evidence of negligence in the management of each train, and the position on which the defendants rely is, that such negligence on the part of the Harlem train, as would preclude that company from an action against the defendants, will also preclude the plaintiff from sustaining his action. The general rule is, that one who receives an injury from the negligence of another may maintain an action for his damages. Upon this rule a natural and reasonable exception has been engrafted, that if the injured party, by his own negligence, has contributed to the injury, he cannot maintain an action, unless the negligence of the other party has been so gross in its character as to be equivalent in law to a wilful injuring. I do not think this exception, or any reasonable extension of it, can be applicable to the plaintiff. He was a passenger on the Harlem cars, con-

¹ *Robinson v. Cone*, 22 Vt. 213; *Chicago C. Ry. Co. v. Wilcox*, 27 N. E. R. 899; 44 A. L. J. 70 (Ill. 91), accord.

ducting himself as he lawfully ought, having no control over the train or its management; on the contrary, bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty, is plainly not founded on any fact of conduct on his part, but is mere fiction. The doctrine contended for is stated and, in a measure sustained, by the decision in *Thorogood v. Bryan*, 8 Common Bench R. 115. That was an action by a passenger in an omnibus against the proprietors of another omnibus, by which the plaintiff was injured. Wishing to alight he did not wait for the omnibus to draw up to the side of the street, but got out while it was in motion, and far enough from the footpath to allow another carriage to pass between it and the path. The other omnibus coming up ran over him. The jury were told that if they thought want of care on the plaintiff's part, or on the part of the driver in not drawing up to the side of the street to put the plaintiff down, had been conducive to the injury, no recovery could be had. Before the decision of this case, *Catlin v. Hills*, 8 id. 123, was argued, an action by a passenger on a steamboat against the proprietors of another steamboat, between which a negligent collision took place, whereby the passenger was injured. In the course of these discussions, *Bridge v. Grand Junction Railway Company*, 3 Mees. & Wells, 244, was also considered, in which the doctrine in question seems to have originated. Judgment was not given in *Catlin v. Hills*, an arrangement between the parties having taken place, but in the first case mentioned the ruling at the trial was maintained. It seems to have been put on the ground that the plaintiff, having voluntarily trusted himself on the omnibus, had so identified himself with its management that the driver's negligence would deprive him of any right to an action against the owners of the other vehicle. Upon the facts of that case, where the driver's negligence consisted only in his not preventing the plaintiff from getting out until he had drawn up to the footpath, there was great room to say that it was as much attributable to the plaintiff as to the driver. But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff had no

control, no management, even no advisory power, over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or by none. To attribute to him, therefore, the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the original exception, and is based on fiction, and inconsistent with justice.

The judgment should be affirmed.¹

Judgment affirmed.

NEGLIGENCE OF THIRD PARTIES.

SLATER v. MERSEREAU.

(64 N. Y. 138. — 1876.)

Nathaniel C. Moak for the appellant.

F. H. Churchill for the respondents.

MILLER, J. The defendant, as a contractor, being in possession and having the control of the premises of Appleton & Co., by the authority of the owners, for the purpose of erecting buildings upon and improving the same, in the performance of his contract possessed the same rights as the owner, and was chargeable for a want of due care and for negligence in the exercise of his rights, if by means thereof the property of the plaintiffs was injured.

The referee found that the water which flowed into the cellar of the building, and injured the plaintiffs, came from the roof by means of the failure of the defendant to direct Moore and Bryant, who were subcontractors, to make the necessary

¹ The doctrine of this case has been followed generally in this country (*Little v. Hackett*, 116 U. S. 336, where plaintiff was riding in a public hack hired for the occasion); and has been adopted by the House of Lords (*The Bernina*, 13 App. Cas. 1 (collision of steamships) overruling *Thorogood v. Bryan*).

cuttings in the wall for the waste-pipe which was intended to connect with the sewer, and without which it could not be connected, so that he failed to provide means to carry off the rain-water. That this was negligence on the part of the defendant, and that the water which flowed into the building from Franklin street did so in consequence of the manner in which Moore and Bryant had carried on the erection of the vault and sidewalk in front of said building, and that this was negligence on their part.

He also decided that the defendant was not responsible for the neglect of Moore and Bryant, but as it was impossible to determine in what proportion the water which came from the waste-pipe and that which came from the street contributed to cause the damage, and as all parties in fault were responsible, that the defendant was none the less responsible because Moore and Bryant shared his fault, and he reported in favor of the plaintiffs for the damages sustained.

* * * * *

The defendant, not being liable for the negligence of Moore and Bryant, as subcontractors, could he be liable for the damages which followed, upon the ground stated by the referee in his report? It is true the defendant and Moore and Bryant were not jointly interested in reference to the separate acts which produced the damages. Although they acted independently of each other, they did act at the same time in causing the damages, etc., each contributing towards it, and although the act of each, alone and of itself, might not have caused the entire injury, under the circumstances presented, there is no good reason why each should not be liable for the damages caused by the different acts of all. The water from both sources commingled together and became one body concentrating at the same locality, soaking through the wall into the plaintiffs' premises and injuring the plaintiffs' property; and it cannot be said that the water which the defendant's negligence caused to flow upon the plaintiffs' premises, and which became a portion of all which came there, did not produce the damages complained of. The water with which each of the parties were instrumental in injuring the plaintiffs was one mass and inseparable, and no distinction can be made

between the different sources from whence it flowed, so that it can be claimed that each caused a separate and distinct injury for which each one is separately responsible. The case presented is not like that where the animals belonging to several owners do damage together, and it is held that each owner is not separately liable for the acts of all, as there is only a separate trespass or wrong against each. (*Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 495; *Partenheimer v. Van Order*, 20 Barb. 479.) No such division can be made of the separate acts in the case at bar, and it bears some analogy to that of *Colgrove v. N. Y. & H. and N. Y. & N. H. R. R. Co.*, 6 Duer, 382; 20 N. Y. 49, where the injury was caused by concurring negligence in the management of the trains of two railroad companies which came in collision, and the defendants were held jointly liable. The collision was but a single act caused by the separate negligence of different parties, which together produced the result. Here also the contractor and subcontractors were separately negligent, and although such negligence was not concurrent, yet the negligence of both these parties contributed to produce the damages caused at one and the same time. It is no defence for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another (*Webster v. H. R. R. Co.*, 38 N. Y. 260); and as the case stands the referee was justified in holding that the defendant was responsible for the entire damages.

There was no error in the admission or rejection of evidence, and no ground is shown for reversing the judgment.¹

¹ Cf. *Bassett v. City of St. Joseph*, 53 Mo. 290; 14 Am. R. 446. The plaintiff, who was kicked by a mule, on striving to escape the kick, jumped into an excavation on the border of the street which, to defendant's knowledge, rendered the street dangerous, was allowed to recover against defendant. (Contra, *Moulton v. Inhabitants of Sanford*, 51 Me. 127. See also *Mars v. Del. & Hud. C. Co.*, 54 Hun, 625; *Alexander v. Town of New Castle*, 115 Ind. 51; *Village of Carterville v. Cook*, 129 Ill. 152; *King v. Troy*, 104 N. Y. 844.

CHAPTER XII.

INSURING SAFETY: VICIOUS ANIMALS.

MULLER v. McKESSON.

(73 N. Y. 195. — 1878.)

Charles H. Mundy for appellants.

Frederick A. Ward for respondent.

CHURCH, Ch. J. The defendants had a chemical factory in Brooklyn and owned a ferocious dog of the Siberian bloodhound species, which was kept in the enclosed yard surrounding the factory, and generally kept fastened up in daytime and loosed at night as a protection against thieves. The plaintiff was in the employ of the defendants as a night watchman. It was his duty to open the gate to the yard every morning to admit the workmen, and to do this he would pass from the door of the factory across a corner of the yard to the gate. On the morning in question, as the plaintiff was returning from opening the gate, he was attacked from behind by the dog, thrown to the ground and severely bitten, and after freeing himself, and while endeavoring to reach the factory, was again attacked and bitten and seriously injured. Upon the close of the evidence, and after a motion for a nonsuit had been denied, the judge decided that there was no question for the jury but the question of damages, to which there was an exception. It is questionable whether this exception is available to the defendants in this court. After the defendants had asked the court to determine the questions as matters of law in his favor on a motion for nonsuit, and they afterwards desired such questions to be submitted to the jury as questions of fact, it was their duty to

have specified the questions which they desired to have submitted. (*O'Neill v. James*, 43 N. Y. 84-93; *Winchell v. Hicks*, 18 id. 558.) The court might have assumed that the defendants rested upon their legal propositions, and thus have been misled. It would be, perhaps, rather rigorous to enforce this rule in this particular case, and we have concluded to waive its application.

The points urged by the appellants in this case are: First. That the plaintiff was guilty of contributory negligence or at least that the evidence would have warranted the jury in so finding. Second. That the plaintiff knew the vicious habits of the dog, and by voluntarily entering upon and continuing in the employment of the defendants, he assumed the risk of such accidents. Third. That if the injury was occasioned by the negligence of the engineer in not properly fastening the dog, or in omitting to notify the plaintiff that he was loose, it was the negligence of a co-servant, for which the defendants are not liable.

It may be that, in a certain sense, an action against the owner for an injury by a vicious dog or other animal, is based upon negligence; but such negligence consists not in the manner of keeping or confining the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice. (*Earl v. Van Alstine*, 8 Barb. 630.) The negligence consists in keeping such an animal. In *May v. Burdett*, 9 Ad. & El. (N. S.) 101, Denman, Ch. J., said: "But the conclusions to be drawn from an examination of all the authorities appears to us to be this, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if he does mischief, negligence is presumed."

When accustomed to bite persons, a dog is a public nuisance and may be killed by any one when found running at large. (*Putnam v. Payne*, 13 J. R. 312; *Brown v. Carpenter*, 26 Vt. 638.) And when known to the owner, corresponding obligations are imposed upon him. Lord Hale says: "He (the owner) must, at his own peril, keep him up safe from doing

hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable in damages." In *Kelly v. Tilton*, 2 Abb. Ct. App. Cas. 495, Wright, J., said: "If a person will keep a vicious animal, with knowledge of its propensities, he is bound to keep it secure at his peril." In *Wheeler v. Brant*, 23 Barb. 324, Judge Balcom said: "Defendant's dog was a nuisance, and so are all vicious dogs, and their owners must either kill them or confine them as soon as they know their dangerous habits, or answer in damages for their injuries." In *Card v. Case*, 57 Eng. C. L. R. 622, Coltman, J., said: "That the circumstances of the defendant's keeping the animal negligently is not essential; but the *gravamen* is the keeping the ferocious animal, knowing its propensities." The cases are uniform in this doctrine, although expressed in a variety of language by different judges. (*Smith v. Pelah*, 2 Strange, 1264; *Jones v. Perry*, 2 Esp. 482; *Greason v. Keteltas*, 17 N. Y. 496; *Woolf v. Chalker*, 31 Conn. 121; *Blackman v. Simmons*, 3 Car. & P. 138; *Rider v. White*, 65 N. Y. 54.)

In some of the cases it is said that from the vicious propensity and knowledge of the owner negligence *will be presumed*, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal, and unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute.

"This presumption of negligence, if it can be said to arise at all, so as to be in any way material in a case where the owner is absolutely bound at his own peril to prevent mischief, is a *presumptio juris et de jure*, against which no averment or proof is receivable. It is not a presumption in the ordinary sense of the word, raising a *prima facie* case which may be rebutted." (*Card v. Case*, *supra*, p. 623, note b.) It follows that the doctrine of non-liability, arising from the negligence of a co-servant, in not properly fastening the animal, or in not giving notice of his being loose, cannot be invoked for the reason that the negligence of the master being immaterial, that of his servant must be also.

The point as to contributory negligence presents the most difficulty. There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. In *Smith v. Pelah*, 2 Strange, 1264, the owner was held liable, although the injury happened by reason of the person injured treading on the dog's toes, the chief justice saying: "For it was owing to his not hanging the dog on the first notice." It is not stated that the person injured knew of the dog's propensities, or that it was done intentionally. In *Woolf v. Chalker*, 31 Conn. 130, it is said that the owner is liable "irrespective of any questions of negligence of the plaintiff," and citing *May v. Burdett* and *Card v. Case, supra*.

In *May v. Burdett* the chief justice, after approving of the ruling in *Smith v. Pelah*, 2 Strange, *supra*, and a passage from Hale's Pleas of the Crown (p. 430), said: "It may be that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, but it is unnecessary to give any opinion as to this." It is not intimated, as before stated, in *Smith v. Pelah*, that the treading on the toes of the dog was done intentionally, or with knowledge of his viciousness, and I do not think that it can be claimed from authority, and certainly not from principle, that no act of the person injured would preclude him from recovering, however negligent or wilful. The apparent conflict on this point arises, I think, mainly in not making a proper application of the language to the facts of the particular case. If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offence, produced the injury. (*Coggswell v. Baldwin*, 15 Vt. 404; *Koney v. Ward*, 36 How. P. R. 255; *Wheeler v. Brant*, 23 Barb. 324; *Blackman v. Simmons*, 3 Car. & P. 138; *Brock v. Copeland*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 628.) But as the owner is held to a rigorous rule of liability on account of the danger to human life and limb, by

harboring and keeping such animals, it follows that he ought not to be relieved from it by slight negligence or want of ordinary care. To enable an owner of such an animal to interpose this defence, acts should be proved with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself. *Brock v. Copeland*, 1 Esp. 203, cited and relied upon by the counsel for the appellant, is in some of its features like this, and while some of the language of Lord Kenyon is not in harmony with that used in other cases, yet from the facts stated it is fairly inferable that the foreman voluntarily went into the yard at an unusual time and, so far as appears, without business, knowing that the dog was loose and knowing his ferocious nature. The question then recurs whether, from the facts appearing in this case, the jury would have been justified in finding that the plaintiff was guilty of that kind of negligence which would relieve the defendants; in other words, could they have found that in any proper sense the plaintiff brought the injury upon himself? He was in discharge of his duty at the proper time and in the right place. He passed from the factory to the gate in the direct path, and was returning when he was attacked by the dog. In *Blackman v. Simmons*, 3 C. & P. 138, the injury was by a vicious bull, and the court laid stress upon the circumstance that the plaintiff was travelling where he had a right to go, and said: "If the plaintiff had gone where he had no right to go, that might have been an answer to the action." It was not shown that the plaintiff was out of his place, nor what was more important and indispensable, was it shown that the plaintiff had notice that the dog was loose, or that he had reason to suppose that he was loose. It was the custom of Godfrey, the engineer, to loose the dog at night and fasten him in the morning, and to notify the plaintiff that the dog was loose. No such notice was given. The plaintiff testifies positively that he did not know or suppose the dog was loose, and from the evidence of Godfrey, called by the defendants, it is inferable that the dog had not been loosed for several days, and if it had the plaintiff had a right to suppose that Godfrey had fastened him that morning. It is sufficient to say

that the evidence did not show that the plaintiff had notice that the dog was loose, nor were the circumstances such as to induce him to believe that such was the fact. If the negligence of the plaintiff is to prevail, it must be predicated upon not taking the precaution to look, examine and ascertain whether the dog was fastened or not. The plaintiff might have ascertained by examination whether the dog was fastened in his kennel or not; but I do not think that he was bound to exercise that degree of care, or that the defendant can be relieved from liability because he did not.

It does not appear that such had been his habit, or that his attention had been called to any circumstance to call for unusual precaution. The evidence must have been sufficient to warrant the jury in finding actual notice that the dog was loose, or at least that the plaintiff had reason to so believe. This rule is quite as liberal as ought to be adopted in favor of a person who keeps an animal of such savage ferocity as this was found to be. *Ilot v. Wilkes*, 3 B. & A. 308, and *Bird v. Holbrook*, 4 Bing. 628, were both cases of spring guns; in the former the person injured had notice, and in the latter, though a trespasser, he had not, and the action was held maintainable in the latter and not in the former. Best, Ch. J., sat in both cases, and in the last said: "If anything which fell from me in *Ilot v. Wilkes* were at variance with the opinion I now express, I should not hesitate to retract it, but the ground on which the judgment of the court turned in that case is decisive of the present, and I should not have labored the point that the action was not maintainable in that case, on the ground that the plaintiff had received notice, unless I had deemed it maintainable if no notice had been given." In the former case Holroyd, J., expresses the principle of non-liability, when notice has been given, to be that the act which produced the injury to the plaintiff "must be considered wholly as his act, and not the act of the person who placed the gun there."

As negligence, in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defence. These terms are not used in a strictly legal sense in this class of actions, but for convenience. There is

considerable reason in favor of the doctrine of absolute liability for injuries produced by a savage dog, whose propensities are known to the owner, on the ground of its being in the interest of humanity, and out of regard to the sanctity of human life: but as these animals have different degrees of ferocity, and the rule must be a general one, I think, in view of all the authorities, that the rule of liability before indicated is a reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences.

The evidence in this case falls far short of warranting a verdict that the plaintiff had committed any such act. As before stated he had no notice that the dog was loose, but had every reason to suppose that he was fastened, and did in fact suppose so. He was in the discharge of his duty, and was not called upon to institute an inquiry whether the dog had broken his fastenings, or that Godfrey had been negligent in not giving him notice that the dog was loose.

The remaining point, that the plaintiff assumed the risk of such accidents, is not tenable. The rule is that a servant assumes the ordinary risks incident to the business in which he engages. What were the risks of his employment here as it respects the dog? He was informed, it is true, of the nature of the animal, but he was also told that the dog would be kept fastened, and the uniform habit was to notify him when the dog was loose. By the terms of his employment, and the conduct of those who represented the defendants, the most that can be said is that he assumed the risks consequent upon the keeping of a ferocious dog, which was kept fastened except when he was otherwise notified. Beyond this the plaintiff is entitled to the same protection as other persons. This is not a case for relaxing the rule of liability. The dog was of immense size, and a brute as savage as a tiger or a lion, and should be more properly classed with such wild beasts than with the domestic dog, which, although useless, is generally comparatively harmless. He had no respect for persons. In the language of the person who sold him to defendants, "he

bit everybody." There is no legal excuse for exposing human life to the ferocity of such an animal.

The judgment must be affirmed.

*Judgment affirmed.*¹

All concur, except RAPALLO, J., absent.

FILBURN v. PEOPLE'S PALACE CO.

(25 Q. B. D. 258. — 1890.)

TORT for injuries inflicted by an elephant owned and exhibited by defendants. The trial judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative, and judgment was entered for plaintiff, from which defendant appealed.

LORD ESHER, M. R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of the classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the

¹ Ordinary familiarities with a dog running loose, such as offering the dog a piece of candy, cannot be called negligence. (*Lynch v. McNally*, id. 347.) It is not necessary that the vicious acts of a domestic animal, brought to the notice of the owner, should be precisely similar to that upon which the action against him is founded. (*Reynolds v. Hussay*, 5 At. 458 (N. H.) 1886.)

The domestic dog is no longer an object of judicial contempt in New York. (*Mallaly v. People*, 86 N. Y. 363.)

best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are *feræ naturæ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs and others that I will not enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions — that is, unless it is shown to be either harmless by its own nature or to belong to a class that has become so by what may be called cultivation, — it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was therefore immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.¹

¹ Concurring opinions were delivered by Lindly and Bowen, LL. J.

In *Decker v. Gamman*, 44 Me. 322, it is said: "There are three classes of cases in which the owners of animals are liable for injuries done by them to the persons or the property of others. 1. The owner of wild beasts, or beasts in their nature vicious, is under all circumstances, liable for injuries done by them. . . . 2. If domestic animals, such as oxen and horses, injure any one, in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless he knew that they were accustomed to do mischief. . . . 3. The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accus-

INSURING SAFETY: KEEPING IN FIRE.

HEWEY v. NOURSE.

(54 Me. 258. — 1887.)

N. Abbott for the defendant.*N. H. Hubbard* for the plaintiff.

DICKERSON, J. This is an action of the case, charging the defendant with kindling a fire upon his own land, for a lawful purpose, "at an unsuitable time and in a careless and imprudent manner," and that the fire, for want of proper care on his part, "spread, and caused great damage to the plaintiff's woodland, down timber, wood and bark." No reference is made in the writ to the statute upon the subject; and the declaration appears to be drawn according to the usual formula where the remedy is sought at common law. As the statute does not abrogate the common law, but is rather a substantial affirmation of it, we need only consider the principles of the common law applicable in such cases.

There was testimony in the case tending to show that there was a piece of crippled land, or land covered with down wood

tomed to do so before. In cases of this kind the ground of the action is that the animals were wrongfully in the place where the injury was done." Cf. *Van Leuven v. Lyke*, 1 N. Y. 515, (Damage by trespassing swine.)

In *Doyle v. Vance*, 6 Victorian L. R. Cases at Law, 87, a dog of defendant while on plaintiff's land, as a trespasser, barked at plaintiff's horse, which ran away, tried to leap over a fence and was killed. Defendant was held liable for the value of the horse as damage fairly resulting from the dog's trespass; and the nisi prius ruling in *Brown v. Giles*, 1 C. & P. 118, that it is no trespass for a dog, without the consent of the master, to jump into another's field, was disapproved.

In *Quilty v. Battie*, 135 N. Y. 201, a married woman who harbored her husband's dog, knowing it to be vicious, was declared liable for maintaining a nuisance, and for all damages directly resulting from it.

If a dog is a nuisance, it may be killed, when killing is necessary to abate the nuisance, *Hubbard v. Preston*, 90 Mich. 221; but if it is a trespasser, only, killing is unjustifiable; *Bowers v. Horen*, 93 Mich. 420.

and brush, adjoining that on which the fire was kindled, and that, after the fire caught on that land, it became unmanageable and was not subject to human control, in consequence of the violence of the wind, until after it had reached the plaintiff's land, and done the damage complained of. The counsel for the defendant contended that the defendant would not be liable for the damage thus done, if the fire was kindled at a suitable time, and in a prudent manner; but the court instructed the jury that, if the defendant was in any fault in setting fire or in guarding and taking care of it at any time before it blew on to the crippled land, in consequence of which fault the wind blew the fire on to the same, he would be liable, although, after the wind so blew the fire, it became unmanageable, until after the plaintiff's property was injured. The verdict was for the plaintiff, and the defendant excepted.

Every person has a right to kindle a fire on his own land for the purpose of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of the defendant. (*Batchelder v. Keagan*, 18 Maine, 33; *Barnard v. Poor*, 21 Pick. 380; *Tourtellot v. Rosebrook*, 11 Met. 462.)

Where only a portion of the instructions to the jury is reported, it will be presumed that the presiding judge gave all other proper instructions. (*Sidensparker v. Sidensparker*, 52 Maine, 481.) The "fault" mentioned in the reported instructions is to be understood as that degree of negligence which amounts to a want of ordinary care. The instructions predicate the defendant's liability upon his neglect to use the ordinary means to prevent the fire spreading upon the crippled land indicated by the evidence. The jury were told, in effect,

that if the defendant's fault were not the sole cause of the wind blowing the fire upon the crippled land, he was not liable. The "fault," to be found by the jury, in order to warrant a verdict by the plaintiff, was not a trifling or insignificant one, but a culpable neglect "in consequence of which the wind blew the fire" into the dangerous quarter, a direction quite as favorable to the defendant as he was entitled to. Whether the fault or negligence consisted in the time or manner of kindling the fire, or the means used to prevent its spreading, was immaterial, as either would be sufficient to render the defendant liable if the plaintiff had suffered injury thereby. We can discover no error in refusing to give the requested instructions, or in the instructions given.

The motion to set aside the verdict as against the weight of evidence is not sustained. There was testimony on both sides, and the jury have found that it preponderated in favor of the plaintiff. The fitness of the time, appropriateness of the manner, and the requirements of ordinary care in respect to the subject matter in controversy, are familiar topics to those usually called to act as jurors. To justify the court in setting the verdict aside, for the cause alleged in the motion, there must be such a manifest weight of evidence against the verdict, as to render it clear that the jury either misapprehended the evidence, or were guilty of gross misconduct. We see nothing in this case to warrant such a conclusion.¹

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¹ For the rule in Iowa under a statute as to prairie fires, see *Thorburn v. Campbell*, 45 N. W. 769. It is negligent to leave a porcelain factory unguarded while kiln is cooling. (*Hauch v. Hernandez*, 6 So. 783; 41 La. Ann. 992.)

INSURING SAFETY: GUNPOWDER.

CARTER v. TOWNE.

(98 Mass. 567. — 1868.)

A. Russ for the defendants.*N. St. J. Green* for the plaintiff.

GRAY, J. By the well-settled rule of the common law, a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person, in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured, who is not himself in fault. The liability does not rest on privity of contract between the parties to the action, but on the duty of every man so to use his own property as not to injure the persons or property of others. The principle has been applied in a great variety of instances, and may be sufficiently illustrated by a few cases of undoubted authority.

In the leading case of *Dixon v. Bell*, 1 Stark. R. 287, and 5 M. & S. 198, the declaration alleged that the defendant sent a young maidservant for a loaded gun, whom he knew to be too young and an unfit person to be intrusted with the care and custody of it, and that she carelessly and improperly shot the gun at and into the face of the plaintiff's minor son, and severely wounded him, and put the plaintiff to great expenses for his cure. Upon evidence tending to prove the facts alleged, Lord Ellenborough submitted to the jury the question whether the defendant was guilty of negligence in intrusting the gun to a servant of such an age, who under all circumstances was likely to make such a use of it as a person of greater discretion would not have done; and instructed them that, if they were of opinion that the instrument in such a state ought not to have been intrusted to such a person, the plaintiff would be entitled to their verdict; and the jury returned a verdict for the plaintiff, which the court of king's bench, after argument,

refused to set aside. So the English courts have held that one who delivers an article which he knows to be of an explosive and dangerous quality to a carrier, without informing him of its nature, is responsible for any injury resulting to the ship in which it is carried, to other goods carried with it, or to the carrier's servant to whom the delivery is made. (*Williams v. East India Co.*, 3 East, 192; *Brass v. Maitland*, 6 El. & Bl. 470; *Farrant v. Barnes*, 11 C. B. (N. S.) 553. See, also, *McDonald v. Snelling*, 14 Allen, 290, and cases there cited; *Vaughan v. Menlove*, 7 C. & P. 525, and 3 Bing. N. C. 468; *Mayor of Colchester v. Brooke*, 7 Q. B. 377; *Longmeid v. Holliday*, 6 Exch. 767, 768; *Grizzle v. Frost*, 3 Fost. & Finl. 622; *McGrew v. Stone*, 53 Penn. State, 436.)

The declaration in this case alleges, and the demurrer admits, that the plaintiff was a child eight years old, had neither experience or knowledge in the use of gunpowder, and was an unfit person to be intrusted with it; that the defendants, knowing all this, sold and delivered to him two pounds of gunpowder; and that he, in ignorance of its effects and using that care of which he was capable, exploded it, and by the explosion was severely injured. This injury was clearly, within the authorities above cited, the proximate and natural consequence of the defendants' negligence in selling a dangerous article to a child whom they knew to be, by reason of his youth and ignorance, unfit to be intrusted with it, and who probably, therefore, as they had reason to believe, might innocently and ignorantly play with it to his own injury. The case cannot be distinguished in principle from that of a man who delivers a cup of poison to an idiot, or puts a razor into the hand of an infant in its cradle. The want of any direct intention to injure does not excuse the defendants. "Every man must be taken to contemplate the probable consequences of the act he does." By Lord Ellenborough, Ch. J., in *Townsend v. Wathen*, 9 East, 280. It is immaterial whether the defendants had or had not a license from the municipal authorities to sell gunpowder; for no license could protect them from liability for the consequences of selling it to a person whom they knew to be incapable of taking proper care of it. The fact that the defendants by their act of negligence

obtained money from the plaintiff certainly does not tend to diminish their liability.

In the cases in which fault on the part of a child, who had not been wanting in the degree of care which could reasonably have been expected from one of his age, has been held to defeat his right to recover damages from an injury resulting to him from another's negligence, either the child was technically a trespasser, unlawfully meddling with the property of another, as in *Hughes v. McFie*, 2 H. & C. 744, and *Mangan v. Atherton*, Law Rep. 1. Exch. 239; or his parents or other persons having charge of him, with whom he was identified, had been guilty of negligence, without which the injury would not have happened. (*Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Wright v. Malden & Melrose Railroad Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Munger v. Tonawanda Railroad Co.*, 4 Comst. 349; *Singleton v. Eastern Counties Railway Co.*, 7 C. B. (N. S.) 287.) But, in the case at bar, the declaration alleges that the child used that care of which he was capable; he did not touch the defendants' property, but property which the defendants had negligently and unlawfully sold to him; and there is nothing to show that his parents or guardians had been guilty of any negligence whatever. Suffering a boy eight years old to be abroad alone is not necessarily negligent. (*Lovett v. Salem & South Danvers Railroad Co.*, 9 Allen, 557. See, also, *Munn v. Reed*, 4 Allen, 431.)

*Demurrer overruled.*¹

¹ The use of a public highway as a place for exploding fireworks constitutes a nuisance, and every participant in the creation of the nuisance is responsible for its ill effects. *Jenne v. Sutton*, 43 N. J. L. 257, holding the president of a political club liable for damages caused by fireworks set off in the street to signalize the meeting of the club. An infant is liable for damages caused by exploding firecrackers in the street. (*Conklin v. Thompson*, 29 Barb. 218.) In this case it was claimed that plaintiff's horse died of sudden fright caused by the explosion of a firecracker under him.

INSURING SAFETY: PASSERS BY.

JAGER v. ADAMS.

(123 Mass. 26. — 1877.)

G. O. Shattuck and J. L. Eldridge for the plaintiff.*A. A. Ranney* for the defendant.

COLT, J. The plaintiff was struck by a falling brick, or part of a brick, while passing along the sidewalk in front of a building in process of erection, upon the front wall of which, in an upper story, the defendant, who was doing the mason work of the building under a contract, had men at work laying brick from the inside. The plaintiff contended that the defendant was liable for not preventing the approach of foot passengers by suitable barriers across the walk, and also for allowing his men to work in that place without protection in front, to prevent the falling of brick or other material upon the thoroughfare below.

There was evidence, consisting in part of the defendant's admissions, from which the jury might have found that the brick was dropped by one of the defendant's men, or fell off the wall at the point where they were at work. And it was possible for them to find that the immediate falling was not shown to have been due to any act which, considering the nature of the employment, could be called the negligent act of the men at work, or of any one of them. To meet this aspect of the case, the plaintiff asked the court to rule that, even if the brick fell by accident, the defendant might be liable for neglect in putting men to handle brick where a passing traveller would be liable to injury from it. The court refused this, and, while instructing the jury that the plaintiff must satisfy them that her injury was the result of fault or negligence of the defendant or of some person in his employ, also told them that, if the falling of the brick was the result of an accident, and not of any negligence of defendant's servants, he was not liable; and that the mere fact that a piece of brick fell from the building that the defendant was erecting would not

justify the jury in presuming that he was guilty of a lack of reasonable care.

But it is a matter of common knowledge and experience, that, when men are breaking and handling bricks in the construction of such a wall, some of the material may fall, although the workmen, in fitting and laying it, are in the exercise of ordinary care. The immediate cause of the fall in such case may indeed be accidental, but it is an accident which the builder of the wall, in view of the danger to life and limb, may be bound to contemplate and provide against by safeguards or barriers, so that the traveller may not be exposed to injury; not to do so would be an "omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do." (Alderson, B., in *Blyth v. Birmingham Waterworks*, 11 Exch. 781, 784.)

The jury found that the plaintiff had failed to prove that the brick which struck the plaintiff fell through the negligence or carelessness of the defendant or his agents or employees, and returned a verdict for the defendant. In view of the plaintiff's request, which sufficiently, though imperfectly, called the attention of the court to the distinctions above stated, and the instruction which was actually given as to the accidental falling of the brick, with the form of the finding by the jury, we think the jury may have misunderstood or been misled by the rulings of the court, and the entry must be

*Exceptions sustained.*¹

¹ The owner of property abutting on the highway is liable for damages caused by the falling of a rotten limb from a tree belonging to him, though standing in the street, even when he is ignorant that he owns the tree. (*Weller v. McCormick*, 52 N. J. L. 470.) Whether the landlord is liable for damages sustained by plaintiff's falling into a coal hole temporarily unguarded, depends upon whether he has surrendered the premises entirely to the control of tenants. (*Jennings v. Van Schaick*, 108 N. Y. 530.)

INSURING SAFETY: LICENSEES.

BYRNE v. N. Y. C. & H. R. Ry. Co.

(104 N. Y. 362. — 1887.)

Esek Cowen for appellant.*R. A. Parmenter* for respondent.

EARL, J. There was some controversy upon the trial of this action as to whether or not the place where the plaintiff was injured was a travelled public highway, and the trial judge submitted the case to the jury upon the assumption that it was not. There was, however, evidence tending to show that there was an alley, at the place where the plaintiff was injured, which was extensively and notoriously used by the public, without any objection on the part of the defendant, or any question as to the right of all persons so to use it; and the judge charged the jury that it was a question for them to determine to what extent and in what manner the alley was used by the public; that if they came to the conclusion that the right of passage was there exercised by the public, as claimed by the plaintiff, notoriously and constantly, previous to and at the time of the accident, then they were required to determine the amount of care and prudence which the defendant was required to exercise in approaching and crossing the alley, and that then the defendant, while not absolutely bound to ring a bell or blow a whistle, yet was bound to give some notice and warning, reasonable and proper under the circumstances, in approaching the crossing; and that it was for them to determine whether such notice and warning was given. The law, as thus laid down, was fully warranted by the case of *Barry v. New York Central & Hudson River Railroad Company*, 92 N. Y. 289. In that case it was held that where the public, for a series of years, had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to all persons to cross at that point, and imposed the duty upon it, as

to all persons so crossing, to exercise reasonable care in the movement of its trains so as to protect them from injury. We think that case, notwithstanding the criticisms of the learned counsel for the defendant in this case, is in entire harmony with the previous cases of *Nicholson v. Erie Railway Company*, 41 N. Y. 525, and *Sutton v. New York Central & Hudson River Railroad Company*, 66 N. Y. 243. In the three cases, the distinction between active negligence causing an injury, and mere passive negligence, was clearly pointed out. In the *Barry Case*, the railroad company carelessly backed its cars against the plaintiff's intestate, and thus caused his death. In the other two cases there was no active negligence, but simply an omission properly to fasten the cars which, without any human agency, moved, and thus ran against the persons injured. The recent case of *Larmore v. Crown Point Iron Company*, 101 N. Y. 391, was similar. There it was decided that a person who went upon the land of another, without invitation, to secure employment from the owner of the land, was not entitled to indemnity from such an owner for an injury received from a defective machine on the premises, not obviously dangerous, which he passed during the course of his journey; and that although it might be shown that the owner could have ascertained the defect by the exercise of reasonable care, yet that he owed no legal duty to a stranger so coming upon his premises which required him to keep the machinery in repair. That was plainly a case of mere passive negligence, an omission to keep a machine in repair which was not obviously dangerous. Here the ground of the defendant's liability is that its agents, engaged actively in its service, carelessly backed a car against the plaintiff and thus injured her. If she had been injured from a defect of the car or engine not obviously dangerous, the case would have been like the *Larmore Case*. If the car had moved upon her without any human agency, simply because it had not been sufficiently secured or fastened, then it would have been like the cases of *Nicholson* and *Sutton*.

There are points of resemblance and points of difference between the *Barry Case* and the other cases. Taking the points of resemblance, a plausible argument may be made to

show that the cases conflict. But taking the points of difference, then, while the distinction between the *Barry Case* and the other case is not so plain as a travelled highway, it is sufficient to require the application of different principles and the reaching of a different result.

The facts of this case, so far as they relate to the accident, are substantially the same as those proved upon the trial which was under review in 83 N. Y. 620, when this case first came to this court. Then we held that there was evidence sufficient for the consideration of the jury, both in reference to the plaintiff's contributory negligence and the negligence on the part of the defendant, and we see no reason to reconsider the conclusion in reference to those matters then reached. It is quite true that the evidence to establish freedom from negligence on the part of the plaintiff, and negligence on the part of the defendant, is very weak and liable to much criticism, and yet we are constrained to think, as we did before, that it was proper for submission to the jury.

There was evidence tending to show that no bell was rung or whistle blown upon the engine attached to the train in approaching this crossing, and the court charged the jury that the defendant was not absolutely bound to ring a bell or to blow a whistle, but that it was bound to give such notice or warning of the approaching train as was reasonable and proper under the circumstances; that it was bound to give by bell, whistle or otherwise such reasonable notice as the jury should find the circumstances required. The charge as thus made was excepted to on the part of the defendant, and its counsel requested the court to charge that if the bell was rung, as testified to by defendant's witnesses, that was a sufficient warning of the approach of the train, and that the defendant was not bound to give any other notice or warning. The judge refused so to charge, and the defendant's counsel excepted. In these rulings there was no error. The defendant was backing its train toward this crossing, which was extensively and notoriously used by the public, and it was bound to use reasonable and ordinary care so as not to endanger those who might be lawfully upon its track at that crossing. And what care and precautions, if any, besides ringing the bell, it

should have taken upon a train thus backing, were properly left for the jury to determine; and so it was held in the *Barry Case*. There, as here, there was a dispute as to whether the bell was rung or the whistle blown as a warning for the approach of the train. There the court charged the jury that in running its cars the defendant was obliged to give such notice and warning as in their judgment would be required as reasonable and proper and calculated fairly to protect the lives of persons using the crossing; that they were to determine whether in backing the train it observed that care and caution which was called for under the circumstances; and that it had a right to back the train, but, under the circumstances of the case, the question was whether it had the right to back it without giving warning in some way to the intestate. The defendant's counsel then requested the judge to charge the jury that if the bell was rung, the defendant was not bound to give any other warning, and in reply to the request the judge said that he left it for the jury to determine whether, under the circumstances, the ringing of the bell would have been such a warning as was requisite. This court held that there was no error in the charge as made or the refusal to charge. Judge Andrews, in his opinion, said: "We think it cannot be held as matter of law, under the circumstances of this case, that the ringing of the bell fulfilled the whole duty resting upon the defendant."

We find no error in the record, and the judgment should be affirmed with costs.

Judgment affirmed.

All concur.

DANIELS v. NEW YORK RY.

(154 Mass. 349. — 1891.)

LATHROP, J. The plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is that, if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table. The turn-table is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about 1,000 feet from the turn-table; that they then asked some trainmen who were switching cars on the tracks adjacent to the turn-table to let them ride on the cars, and, on being refused, went to the turn-table. The only thing stated in the exceptions to show that the turn-table was attractive is that it had large upright standards or guys, 12 to 15 feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that, if a turn-table is of a dangerous nature and character, when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty

of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. (*Stout v. Railroad Co.*, 2 Dill. 294; *Railroad Co. v. Stout*, 17 Wall. 657.) The decision of the Supreme Court of the United States was apparently approved of in *Railroad Co. v. Bailey*, 11 Neb. 332, and followed in *Railway Co. v. Simpson*, 60 Tex. 103; *Railway Co. v. Styron*, 66 Tex. 421; *Railway Co. v. McWhirter*, 77 Tex. 356. (See, also, *Bridger v. Railroad Co.*, 25 S. C. 24; *Ferguson v. Railway Co.*, 75 Ga. 637, 77 Ga. 102.)

The second class of cases proceeds upon the doctrine of constructive invitation; that is, that, if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser; and it is held that leaving a turn-table unguarded is such an act. (*Keffe v. Railway Co.*, 21 Minn. 207; *O'Malley v. Railway Co.*, 43 Minn. 239; *Railway Co. v. Fitzsimmons*, 22 Kan. 686; *Nagel v. Railway Co.*, 75 Mo. 653.) The decision of the Supreme Court of the United States in *Railroad Co. v. Stout* rests upon the proposition stated by Mr. Justice Hunt, "that, while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." The cases cited in support of this proposition are *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507; *Daley v. Railroad Co.*, 26 Conn. 591, and *Bird v. Holbrook*, 4 Bing. 628. With the exception of *Daley v. Railroad Co.*, all of these cases come within other rules, or within well-defined exceptions to the general rule that a landowner owes no duty to a trespasser, except he must not wantonly or intentionally injure him or expose him to injury. *Lynch v. Nurdin*, *ubi supra*, rests upon the doctrine that, if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary, however, was held in *Hughes v. Macfie*, 2 H. & C. 744, and in *Mangan v. Atterton*, L. R. 1 Ex. 239. In *Lane v. Atlantic Works*, 111 Mass. 136, the plaintiff was found to be without fault, and not

a trespasser. See, also, *Clark v. Chambers*, 3 Q. B. Div. 327; *Powell v. Deveney*, 3 Cush. 300. *Birge v. Gardiner*, *ubi supra*, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332. *Bird v. Holbrook*, *ubi supra*, decides that a land-owner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that, if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same, though no notice is given. (*Johnson v. Patterson*, 14 Conn. 1.) This, as pointed out by Morton, J., in *Marble v. Ross*, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. *Marble v. Ross*, 124 Mass. 44. The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. (*Larue v. Hotel Co.*, 116 Mass. 67; *Beck v. Carter*, 68 N. Y. 283.) The case of *Daley v. Railroad Co.*, *ubi supra*, so far as it tends to support the result reached in *Railroad Co. v. Stout*, *ubi supra*, must be considered as overruled by *Nolan v. Railroad Co.*, 53 Conn. 461.

The Court of Appeals of New York has stated, in a well-considered case, that it does not uphold the decision in *Railroad Co. v. Stout*, *ubi supra*, and, although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. (*McAlpin v. Powell*, 70 N. Y. 126.) In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire-escape, and fell through a trap-door therein, which was insecurely fastened. The defendant was the landlord of the house, and it was his duty to keep the fire-escape in order. It was held that he owed no duty to one who was using the fire-escape for his own pleasure, and that the defendant was not liable. In *Frost v. Railroad Co.*, 64 N. H. 220, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was that he was

attracted to the turn-table by the noise of boys playing upon it. The turn-table was on the defendant's land about 60 feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of *Railroad Co. v. Stout*, *ubi supra*. On the question whether the defendant was liable on the ground of an implied invitation, Clark, J., in delivering the opinion of the court, said: "one having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or inclose it, or exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys, who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted. (*Hounsell v. Smyth*, 7 C. B. (N. S.) 731, and cases cited; *Clark v. Manchester*, 62 N. H. 577; *Klix v. Nieman*, 68 Wis. 271; *Gramlich v. Wurst*, 86 Pa. St. 74; *Cauley v. Railway Co.*, 95 Pa. St. 398; *Gillespie v. McGowan*, 100 Pa. St. 144; *Hargreaves v. Deacon*, 25 Mich. 1. See also *Sweeny v. Railroad Co.*, 10 Allen, 368; *Metcalf v. Steamship Co.*, 147 Mass. 66, and cases cited; *Barstow v. Railroad Co.*, 143 Mass. 535.) In *Johnson v. Railroad Co.*, 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars, and went to a house near by, intending to take a later

train for Lawrence. After remaining at the house for a while, she returned to the station, and, while crossing the tracks to the station of another railroad corporation to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth so as to form a convenient passage-way; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it, and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passage-way by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. (See, also, *Wright v. Railroad Co.*, 129 Mass. 440.) In *Morrissey v. Railroad Co.*, 126 Mass. 377, a child, four years of age, was run over by the cars of a railroad corporation while using the track as a play-ground. There was a foot-path across the track which was used by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the track. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and willful carelessness; and this question was submitted to the jury, who found for the defendant.

In *Wright v. Railroad Co.*, 142 Mass. 296, there was a well-defined path leading to a railroad track, and an opening in a ridge near the track, and a passage-way for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight cars stood on the track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The

plaintiff, a boy between six and seven years of age, was injured while going to school, and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track. The case of *McEachern v. Railroad Co.*, 150 Mass. 515, came up on demurrer to the declaration, which alleged, in substance, that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable, upon receiving a slight touch, to fall to the ground; that the defendant well knew that said car "then was, and would be, an enticing, attractive, and inviting object to children, and well knowing that children then were, and long prior thereto had been, accustomed to play in, upon, around, and about such cars as might happen from time to time to be placed upon any of said side tracks;" that the plaintiff, being then upwards of 11 years of age, was travelling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit. In *McCarty v. Railroad Co.*, 154 Mass. 17, a child about five years old strayed from the yard of the house in which it lived onto a street, and thence into the freight yard of a railroad corporation, where it was injured. The freight yard was parallel with the street, and there was no fence between. It was held, in the absence of evidence that a fence was required by Pub. St. c. 112, § 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff. The cases which we have last

cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him. The Superior Court rightly directed a verdict for the defendant.

*Exceptions overruled.*¹

CHRISTIAN v. ILL. CENT. RY.

(71 Miss. 237. — 1894.)

COOPER, J. We will not review particularly the 16 instructions asked and received by the defendant. Some of them may

¹ In *Union Pac. Ry. v. McDonald*, 152 U. S. 262, *Lynch v. Nurdin and Railroad Co. v. Stout* were approved and followed. The railroad company operated a coal mine near its depot in a village, and deposited, alongside the usual approach to the mine in a long trench, coal slack which was piled up to a level with the path, and which took fire by spontaneous combustion and burned continuously below the surface—a coating of ashes concealing the fire. Plaintiff below, a child of 12 years, was attracted to the opening of the mine by the sight of a pair of mules descending the shaft, and being frightened by miners who yelled “Lets grease him,” started to run along the path but slipped and fell into the burning slack. Plaintiff obtained judgment for \$7,500 and the railroad company appealed; but the judgment was affirmed. The court said, “We adhere to the principle of *Railroad Co. v. Stout*. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew the children were in the habit of frequenting that locality, and playing around the shaft house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind, or rain prevailed) a mass of burning coals, into which a child might accidentally fall and be burned to death. Under all

be correct, but throughout them as a whole runs the wholly erroneous proposition that the mere negligent injury of a trespasser by the servants of a railway company is not ground of action by the trespasser. Under the sixth instruction the jury was, in effect, told that the plaintiff could not recover unless the engineer intentionally or purposely ran him down. If that were true, the plaintiff, being a trespasser, must show such injury that, if it had resulted in his death, the servant of the company inflicting the injury would be guilty of murder. By the seventh instruction the jury was told that the plaintiff could not recover unless the conduct of the defendant's servant "was regardless of consequences, and without effort to prevent injury." The true rule is that the servants of the company are not bound to keep a lookout for trespassers, but, if they see one, and appreciate his danger, and that he cannot, by the exercise of reasonable effort, extricate himself, then they in turn must exercise reasonable care to prevent injury to him, and what is such reasonable care is a question of fact determinable by the circumstances. (*Jamison v. Railroad Co.*, 63 Miss. 33; *Railroad Co. v. Williams*, 69 Miss. 631; *Railroad Co. v. Watly*, 69 Miss. 145; *Railroad Co. v. Cooper*, 68 Miss. 368.)

Judgment reversed.

the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision." Cf. *Chenery v. Fitchburg Ry.*, 160 Mass. 211.

CHAPTER XIII.

*SPECIAL RELATIONS OF CONTRACT AND TORT.
SECTION 2. DOUBLE RIGHT OF ACTION.*

SHAW v. COFFIN.

(58 Me. 254. — 1870.)

D. D. Stewart for the plaintiff.*William Folsom* for the defendant.

APPLETON, Ch. J. The defendant, while a minor, having stolen money and other property of the intestate, which he converted into money, settled with him for the sums thus tortiously obtained, by giving his promissory note therefor.

This action is for the moneys stolen, and for the note given on settlement of the same.

The note given by the defendant, when a minor, has not been ratified. The note of an infant, given on the adjustment of an account against him, is voidable. It is equally voidable, though given on a settlement for damages arising from his torts. The defendant, having avoided his note by the plea of infancy, the plaintiff is remitted to his original cause of action, as existing before the settlement by the defendant.

It is well settled that an infant is liable in the appropriate form of action for his torts. He would, therefore, be held in an action of trover for money stolen.

Is an infant liable on assumpsit for money stolen, or for the proceeds of stolen property when converted into money? The thief of full age is so liable. The owner of property stolen, and converted into money by the thief, may obtain assumpsit against him for money had and received. (*Howe v. Clancey*,

53 Maine, 130; *B. & W. R. R. Co. v. Dana*, 1 Gray, 83.) The reasons upon which these decisions rest apply equally to the minor as to the adult. If the minor is liable for his torts, it is immaterial to him in what form of action recompense is sought. If for the purposes of justice the tort may be waived in the case of the adult, and assumpsit maintained, it can, to accomplish the same great purpose, be equally well waived as to the minor. It would be a reproach to the law, if a minor, when arrived to years of manhood, were to be allowed to escape from the payment of what is due, by the plea that he had stolen the money demanded of him when under age. In *Walker v. Davis*, 1 Gray, 506, Thomas, J., says: "The defendant obtained the possession of her (the cow) by fraud, a fraud to which infancy would constitute no defence. Supposing no contract to have been made, the plaintiff then had the election to bring his action for the tort, or, as the cow had been sold before the note became due, to waive the tort and bring assumpsit." In *Towne v. Willey*, 23 Vt. 359, referring to the liability of infants for torts, Redfield, J., in delivering the opinion of the court, says: "In all the cases, then, upon this subject, it will be found that the courts profess to hold infants liable for positive, substantial torts, but not for violations of contracts merely, although by construction the party claiming redress may be allowed, by the general rules of pleading, to declare in tort or contract at his election." The precise question here presented arose in *Elwell v. Martin*, 32 Vt. 217, and the court there held that the defendant was liable in assumpsit for money tortiously taken by him during his infancy.

The plaintiff proves a demand on 30th December, 1847, from which the defendant is liable to pay interest.

FOWLER v. WATER-WORKS CO.

(83 Ga. 219. — 1889.)

BLECKLY, Ch. J. Fowler brought action against the Athens City Water-Works Company, making the following allegations in his petition: In August, 1882, the mayor and council of the city of Athens contracted with one Robinson . . . that he would furnish at all times for a consideration mentioned in the contract, all the water necessary for fire purposes; establish fire hydrants to the number of 55, and guarantee at all times a sufficient pressure to throw from any of these hydrants, through a one-inch nozzle and 50 feet of 2½-inch hose, 5 streams of water to the height of 65 feet; that Robinson, for a valuable consideration in 1882, transferred this contract to the defendant; that the defendant is paid by a tax levied on the property of the citizens of Athens; that the petitioner, since 1882, has been a resident and a taxpayer of Athens, for many years owning a certain house and lot; that the defendant ran its mains along the street by his house and established near his house two fire hydrants; that in July, 1887, some of the outhouses on the lot caught fire without his fault; the fire extended to the main dwelling and all were consumed; that the alarm of fire was promptly responded to and the fire companies were on hand at a time when it could have been easily controlled, but there was so little pressure that the water would not go 10 feet beyond the nozzle, and was of no use in putting out the fire; that if proper pressure had been put on the fire could easily have been extinguished and the property saved. Damages were laid at \$1,500. At the trial a contract corresponding with that described in the declaration was put in evidence. By it the city agreed to pay to Robinson, his successor or assigns, for 30 years from the completion of the water-works, as a rental for the use of the hydrants and for the supply of water for the purposes mentioned in the agreement, the sum of \$3,000 annually. It was proved that the defendant had succeeded to the position of Robinson in the contract, and had received from the city rents accordingly, undertaking to carry out the terms of the contract. The occurrence of the fire, the

consumption of the plaintiff's buildings, his loss and the failure of the company to have a water supply on the occasion equal to that provided for by the contract, or any supply adequate to the exigencies of the fire, also appeared in evidence. The court on motion of the defendant ordered a nonsuit. This is the error complained of. . . .

In *Robinson v. Chamberlain*, 34 N. Y. 389, the duties of the contractor did not rest on contract alone, but were prescribed by statute. The court analogized his position to that of a public officer, in respect both to his duties and his powers. Stress was also laid upon his undertaking to repair a public thoroughfare (the canal), and that this was a public function formerly devolving on public officers. In *Couch v. Steel*, 3 E. & B. 402, the duty neglected was also imposed by statute. Such likewise was the duty in *Atkinson v. Newcastle Co.*, L. R. 6 Ex. 404, which case was reversed on appeal (L. R. 2 Ex. Div. 441), the appellate court holding that under a proper construction of the particular statute involved the action would not lie. The court, composed of Lord Cairns, L. C., Cockburn, C. J., and Brett, L. J., intimated doubts as to the correctness of *Couch v. Steel*. In *Met. Com. Casting Co. v. Ry. Co.*, 109 Mass. 277, the act complained of was a plain tort of the indirect kind, and no contract relation was involved. It was held in *Willy v. Mulledy*, 78 N. Y. 319, that the neglect of a duty imposed by statute would give a right of action to any person having a special interest in its performance, and injured by the breach. The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of the requisite privity between the parties before the court. A case directly in point is *Davis v. Clinton Water Works*, 54 Ia. 59. See also *Nickerson v. Bridgeport H. Co.*, 46 Conn. 24.

There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the commu-

nity and a tax-payer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. (*Wright v. Augusta*, 78 Ga. 241.) We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law.

There was no error in granting the nonsuit.¹

¹ (*Mott v. Water-Works*, 48 Ks. 12; *Britton v. Green Bay Water-Works*, 81 Wis. 48; *Eaton v. Fairbury Water-Works*, 37 Neb. 546, accord. Cf. *Le Lievre v. Gould*, (1893) 1 Q. B. 491.) In *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 354, it is said: "It is too plain for discussion that the city of Paducah had the power, and did make the contract for the benefit of its inhabitants, and consequently, each one of them has a right to sue and recover for an injury caused by breach of it."

MALICIOUS EXERCISE OF A RIGHT.

CHESLEY v. KING.

(74 Me. 164. — 1882.)

Bean and Beane for the plaintiff.*L. C. Cornish (Joseph Baker with him)* for the defendant.

BARROWS, J. Damages were claimed by the plaintiff for two acts of the defendant alleged to be wrongful and injurious. I. The cutting off in August, 1879, of certain aqueduct logs lying in the defendant's land and leading from a spring at which the plaintiff had the right and privilege of taking and drawing water by an aqueduct, which aqueduct the plaintiff alleges he put into the spring in 1870, for the purpose of supplying his premises. II. The digging a well in the defendant's land above the said spring with the malicious intent of cutting off the sources of supply from said spring, the result of which was that it became dry and useless.

* * * * *

Seeing it is settled that this injury, of which the plaintiff complains, is, in ordinary cases, where the owner of the adjacent land exercises his paramount right in good faith for his own or the public convenience or advantage, merely *damnum absque injuria* and no proper foundation for an action, the next inquiry is, whether it becomes a good cause of action where the proprietor of the land makes his excavations not for the purpose of accommodating or benefiting himself or others, but merely to do a damage to his neighbor who has some qualified rights in the spring. There is a conflict of authority either in decisions or *dicta* upon this point, some courts of high standing, notably those of New York, Pennsylvania and Vermont, having said in some of their cases, broadly, in substance, as in *Glendon Iron Co. v. Uhler*, 75 Penn. Stat. 467; *S. C.* 15 Am. Rep. 599, that "the commission of a lawful act does not become actionable although it may proceed from a malicious motive."

In view of the very numerous cases where "the commission of a lawful act *does* become actionable" by reason of the mere carelessness of him who does it, when it results in damage to innocent parties, it sounds strangely to say that its commission for the sole purpose of inflicting damage upon another, and without any design to secure a benefit to its doer or others, is not actionable when the damage intended is thereby actually caused. We rather incline to the view that there may be cases where an act, otherwise lawful, when thus done may combine the necessary elements of a tort, "an actual or legal damage to the plaintiff and a wrongful act committed by the defendant," or in other words, may be an invasion of the legal rights of another accompanied by damages. One of the legal rights of every one in a civilized community would seem to be security in the possession of his property, and privileges against purely wanton and needless attacks from those whose hostility he may have in some way incurred. We think there is more unexceptionable truth in the statement of the general principle in Com. Dig. Action on the Case, A: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages;" and in the remark of the court in *Walker v. Cronin*, 107 Mass. 562, thereupon: "The intentional causing of such loss to another without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong."

At all events it is worth while to examine the cases which are cited in support of the proposition above quoted from *Glendon Iron Co. v. Uhler*, to see how far the decision rests upon this doctrine, and how far upon other matters.

We think it will be found in most, if not all of them, the case was well disposed of, either upon the ground that the plaintiff had not the right or property which he claimed in the subject of the injury, or that the defendant's acts might well be regarded as done not from the sole desire to inflict damage upon his neighbor, but partly, at least, from a justifiable, perhaps laudable design, to promote his own advantage or that of others, or protect his own property from subjection to some servitude by doing acts which, as between himself and

the plaintiff, he might lawfully do, — or because, for reasons of public policy, the plaintiff was precluded from asserting an act to be maliciously done which was within the scope of the defendant's authority or right, and might well be referred to legitimate motives.

The particular case of *Glendon Iron Co. v. Uhler, ubi supra*, seems really to have turned upon the point that plaintiffs could have no exclusive right to use a mere geographical appellation as a trade mark, and that the defendant actually manufacturing the same article at the same place was equally entitled to consult his own advantage by using the same name as a trade mark. Where the plaintiff had no property to protect, it is perhaps not strange that the court should refuse to go into an inquiry as to the defendant's motives in doing an act which could not constitute an injury. That there was an admixture of what the law regards as a malicious motive for the defendant's act, with other indifferent or laudable designs, could not be expected to confer a right of property on the plaintiff which he did not before possess. The case most relied upon to support the doctrine seems to be *Phelps v. Nowlen*, 72 N. Y. 39, and 28 Am. Rep. 93; and as it approaches the case at bar perhaps as nearly in its facts as any other citation on the same side, it should receive careful examination. It presents the case of a withdrawal of a favor which the plaintiff had previously received from the defendant in the maintenance of an embankment around a spring on defendant's land, which embankment raised the water in plaintiff's well. The defendant dug through the embankment with the knowledge that such digging would diminish the water in the plaintiff's well and with the intention to do it; and the case finds "that in so far as such intent and purpose under the circumstances above found can constitute malice, his motive was malicious." But it is difficult to see how the simple withdrawal of a favor, which has conferred no vested right to its continuance, can constitute actionable malice. While the court, undoubtedly, *arguendo*, refer approvingly to the doctrine under consideration as laid down very broadly in the cases cited, it is noticeable that it adverts with satisfaction to the probable existence of a lawful motive, thus: "It may have been law-

fully done by the defendant to prevent a diversion of water, the use of which he claimed, and which, if allowed to continue, by lapse of time might ripen into a claim of right by prescription; and hence, although the ostensible object was to diminish water which has been unlawfully appropriated by another, the intent *cannot* well be considered as malicious, or the purpose a wrongful one. That it proves injurious to another is more the fault of a party who reaps a benefit from that which does not belong to him, than of the one who was originally entitled to it and is only claiming his just rights." In further discussion of cited cases, the learned court also advert to the doctrine imported from the civil into the common law, as stated in *Acton v. Blundell*, 12 M. & W. 335, and *Chasemore v. Richards*, 7 H. L. C. 349, and remark thereon: "The rules last stated may, perhaps, be applied in cases where it is entirely obvious that the act was done solely for the purpose of inflicting a wrong, and with no intention of vindicating a right or preventing a wrong being done to the interests of another." Certainly the support given by this case to the doctrine contended for is somewhat equivocal, and the case seems really to have turned upon the want of any right in the plaintiff, and the probability of lawful and not (properly speaking) malicious motives in the defendant. The same elements are obvious in other cases cited to maintain this questionable dogma.

Thus in *Auburn Plank Road Co. v. Douglass*, 5 Selden, 444, the court seem to have held that, in a case of the dedication of his land by a man to the public for use as a way, they would not inquire into his motives, at the instance of the corporation with a charter right to take toll, who alleged malicious injury. The motive might have been charitable and the court apparently would not repress benevolence or public spirit by such an inquiry into its motives. But upon the same facts it was held that equity would restrain the dedicator from keeping his road open in such a way as to enable those who travelled on the plank road to avoid the toll-gate. (12 Barb. 553.)

We see no reason why a man should maintain an action against an underwriter or an insurance company for refusing to contract to insure his property because he has injected into his declaration an allegation that the refusal was malicious.

Neither law nor equity could compel them to insure the property of those with whom they did not choose to contract. There is a plain lack of right in the plaintiff, and the proposed inquiry into motives is immaterial. (*Hunt v. Simonds*, 19 Missouri, 583.)

The general doctrine of *Walker v. Cronin*, 107 Mass. 555, is not what counsel claim, but rather that while a man has no right to protection against competition, he "has a right to be free from malicious and wanton interference, disturbance and annoyance." The *dictum* in *Walker v. Cronin*, adverse to this same doctrine, as it was shadowed forth in *Greenleaf v. Francis*, 18 Pick. 117, seems to be based upon what we conceive to be the erroneous assumption that the owner of a spring has no rights whatever in water percolating through the soil of adjacent proprietors, because his rights therein are assuredly subject to the paramount claims of the owner of the soil, operating in good faith in his own land for a "justifiable cause."

Why anybody should have supposed that the courts would deem it worth while to indulge a litigious spirit so far as to inquire into the motives of a man who has thrown down fences on his own land, put there to mark the lines of a road never lawfully laid out, is not apparent. Such an immaterial inquiry was properly enough refused in *Jenkins v. Fowler*, 24 Penn. St. 308. Litigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry. It was rightly held they were not, in *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505. And this is in harmony with the doctrine that proof of malice alone will not support an action for malicious prosecution when there is probablè cause. Nor would it be wise as matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground, and it was rightly forbidden in *Benjamin v. Wheeler*, 8 Gray, 409. And here we come to the reasons well worthy to be considered, given for the rule in *Phelps v. Nowlen*: "A different rule would

lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the property which inheres to the owner of the soil. . . . Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights."

Apparently it is the danger of just such verdicts as that which was rendered in the case at bar, which has induced these courts of high standing to make a sweeping denial of the right to inquire into motives in such cases as we have been reviewing, where no substantial right of the parties complaining has been infringed. We are not satisfied, however, that the rule can be maintained as broadly as it has been asserted on this account, and we think there is a still greater danger of its being perverted into a bulwark of oppression and injustice, by the denial of a remedy where a substantial right has been invaded. It seems to us that the denial is broader than the cases required. We think it cannot be regarded as a maxim of universal application that "malicious motives cannot make that a wrong which in its own essence is lawful."

Chatfield v. Wilson, 28 Vermont, 49, is an authority not to be overlooked, for the instructions of Poland, J., there considered and condemned, were not substantially different from those given in the case at bar, and the court say: "It may be laid down as a position not to be controverted that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it," apparently assuming that the wanton infliction of damage is not a violation of legal right. Washburn in his *Treatise on Easements*, etc., has an instructive review of decisions touching this point (pp. 488-492, 3d ed.), and notices (as do the court in *Phelps v. Nowlen*), the fact that in the later case of *Harwood v. Benton*, 32 Vt. 737, the Vermont court remark upon the absence of any imputation of wanton and improper motive as an element in the defendant's liability, and seem purposely to avoid expressing any opinion as to the correctness of *Chatfield v. Wilson* on that point.

In commenting upon the general aspect of the question, Washburn says in substance, that courts unequivocally recog-

nize one's right to have his well or spring supplied by underground sources so far as to protect it against invasion by a stranger, and he adds: "It would therefore seem to constitute a something of which *meum* and *tuum* might be predicated, and in regard to which the maxim *sic utere tuo*, etc., would not be wholly foreign, especially when the party destroying it does it by using his property, not for his own benefit, but solely for the purpose of depriving his neighbor of what he would otherwise have rightfully enjoyed."

Upon the whole, we are better satisfied with the view of the law on this point which we get from *Acton v. Blundell*; *Roath v. Driscoll*, 20 Conn. 523; *Wheatley v. Baugh*, 25 Penn. St. 528, and from *Panton v. Holland*, 17 Johns. 92, 98, and from the instructions approved in *Greenleaf v. Francis*, 18 Pick. 119, than with that given in *Chatfield v. Wilson*.

We think this plaintiff had rights in that spring, which, while they were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water, should not be ignored if it were true that defendant did it "for the mere, sole and malicious purpose" of cutting off the sources of the spring and injuring the plaintiff, and not for the improvement of his own estate.

But the testimony is of a character that conclusively negatives the defendant's guilt. The vital facts in the case show that he suffered from a short supply of water now and then during all the years that his aqueduct ran through the plaintiff's land, because the plaintiff's premises were lower than his, and the plaintiff persisted even in dry times in exercising the advantage which he thereby had. The conclusion upon the whole evidence is irresistible that the defendant, after a long trial, was justified in severing his aqueduct from that which ran to the plaintiff's premises. Upon his doing so, the plaintiff continued his aqueduct, as he had a right to do, to the spring, and entered it at a point lower than the defendant, and defendant was again deprived of a sufficient supply. There is no testimony which, fairly weighed, can lead to the conclusion that he dug the well for any purpose except to supply the deficiency that he experienced. The special find-

ing on this point is altogether against the weight of evidence and must be set aside.

New trial granted.

WALTON, DANFORTH, PETERS and LIBBEY, JJ., concurred.

APPLETON, Ch. J., concurred in the result.¹

BOYSON v. THORN.

(98 Cal. 578. — 1893.)

HAYNES, C. Defendant demurred to plaintiff's complaint, the demurrer was sustained, and judgment was thereupon rendered dismissing the action, from which judgment the plaintiff appeals.

The complaint alleges that Frank G. Newlands is the owner and in possession and control of the Palace Hotel in the City of San Francisco, and of a public restaurant attached thereto, and conducted the same as a hotel and restaurant, and that the defendant during all the times mentioned in the complaint was the agent of Newlands, and as such had charge of the business thereof and direction of the servants therein; that immediately prior to November 1, 1889, Newlands entered into an agreement whereby plaintiff hired certain rooms in said hotel, as lodgings for himself and wife from November 1, 1889, at the monthly rent of one hundred dollars; that they were to have their meals at said restaurant or furnished from said restaurant to their said rooms, he paying therefor the usual rates; that they entered and occupied the rooms, and in all things complied with said agreement, but that on December 5, 1889, the "defendant maliciously and with intent to oppress, annoy, and disturb plaintiff in the occupancy of his lodgings, and to force him to abandon the same, and to deprive him of the comforts and con-

¹ Cf. *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598. A valuable article on the doctrine of *Lumley v. Gye* will be found in 2 Harvard L. Rev. 19. See also "Privilege, Malice and Intent," by Mr. Justice Holmes, 8 Harv. L. R. 1.

veniences which he was then and there enjoying, and to injure him in his profession, and to degrade and belittle him in the eyes of the guests of said hotel and of his friends and of the public in general, and in fraud of said agreement, caused and procured F. G. Newlands then and there to demand that plaintiff and his wife forthwith vacate said lodgings." It is further charged that defendant maliciously caused and procured Newlands to refuse to furnish meals, etc.; and to instruct the servants to refuse their orders; and that on December 12, 1889, defendant maliciously caused and procured Newlands to threaten and attempt to forcibly eject plaintiff and his wife from said rooms, whereby his wife became ill, and he was compelled to and did employ a nurse at an expense of sixty dollars, and also to hire men to protect his wife and retain possession, etc., at a further expense of sixty dollars, and prays for twenty-five thousand one hundred and twenty dollars damages.

The action is against Thorn alone. The demurrer is that the facts stated do not constitute a cause of action against the defendant.

The broad question presented is whether an action will lie against one who, from malicious motives, but without threats, violence, fraud, falsehood, deception, or benefit to himself, induces another to violate his contract with the plaintiff. We state the question thus because it will be observed that the complaint does not state the *means* used to cause or procure Newlands to violate his contract with the plaintiff, but only that it was done "maliciously."

The general rule is that only those that are parties to, or in some manner bound by a contract, are liable for a breach of it. To this general rule there are certain exceptions as, for example, contracts for personal services involving the relation of master and servant; and there are also other cases that are sometimes classed as exceptions, but which are not strictly so.

In Cooley on Torts, 2d ed., p. 581, it is said: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff, the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it. But if the third person was induced to break his contract by deception, it may be different. If, for example, one were to personate a ven-

dee of goods, and receive and pay for them as on a sale to himself, the vendee would have his action against the vendor; but he might also pursue the party who by deceiving one had defrauded both." In the case supposed by the learned author, the gist of the action is the fraud of the defendant in personating the vendee. The fact that the only injury or damage sustained by the vendee in consequence of defendant's fraud was the loss of the benefit he would have derived from the performance of the contract, does not at all change the character of the action. Suppose that A, knowing that B is about to bestow upon C, as a gratuity, a large amount of money or property, fraudulently personates C, and receives the money or property, C could have no action against B, for there was no contract relation between them; but C could have his action against A for the loss caused by his fraud. The means used to accomplish the wrong is in each case the same, showing conclusively that the fraud is the basis of the action, while the breach of the contract thus procured goes only to the question of damages; that is, how and in what manner and to what extent has the plaintiff been injured by the fraud, deceit, or other wrongful act of the defendant.

Rice v. Manley, 66 N. Y. 82; 23 Am. Rep. 30, cited by appellant, is another illustration. There the plaintiff had contracted verbally with Stebbins for the purchase of a large quantity of cheese. The defendant Manley procured a telegram to be sent to Stebbins in the name of E. Rice, falsely saying that plaintiffs did not want the cheese, and thereby induced Stebbins, who supposed E. Rice was one of the plaintiffs, to sell the cheese to Manley. Stebbins was not bound by the verbal contract, but it is found that he would have performed it but for the fraud of defendant. The action was sustained.

Benton v. Pratt, 2 Wend. 385; 20 Am. Rec. 623, also cited by appellant, was another case where a contract with the plaintiff was broken because of defendant's false representation that plaintiff had abandoned all intention of fulfilling it.

Lally v. Cantwell, 30 Mo. App. 524, also cited by appellant, was an action for loss of employment. The court, after discussing the cases involving the relation of master and servant, said: "But this case falls within another well-settled principle, which is that where the interference takes the form of false,

defamatory statements — of libel or slander — an action will lie for interference with a relation beneficial to the plaintiff, although the relation did not rest in contract, and although the breach of it by the party who was procured to break it was not actionable.”

The cases are too numerous to be cited or reviewed where interference with business or contract relations, through acts of violence, nuisance, threats, deceit, fraud, libel, or slander, have been redressed, both in England and in this country. Most of the cases cited by appellant which do not involve the relation of master and servant, will be found of the character above mentioned, though in many of both classes will be found expressions which more or less directly support the proposition for which appellant contends.

Cases involving the relation of master and servant, though that relation is now created solely by contract, seem to stand upon different grounds from contracts not involving that relation. Section 49 of the Civil Code, entitled “Protection to Personal Relations,” is as follows: “The rights of personal relation forbid: 1. The abduction of a husband from his wife, or of a parent from his child. 2. The abduction of a wife from her husband, or of a child from a parent or guardian entitled to its custody, or of a servant from his master. 3. The seduction of a wife, daughter, orphan sister, or servant. 4. Any injury to a servant which affects his ability to serve his master.”

In this state, at least, no analogy favorable to appellant can be drawn from cases involving what the code itself declares to be “a personal relation” existing between master and servant. The code does not distinguish between different means which may be employed to disturb or destroy any of these relations, for it is the direct interference with the *relation* which is forbidden, whether the relation be founded in natural right, as parent and child, or created by law, as guardian and ward, or by personal contract, as between master and servant, and therefore does not depend upon the mode or means in or by which the relation may be created. It is not the mere procuring of one party to a contract to break his contract, but it is the taking away from or depriving the master of the *subject* of the contract, or that which the master contracted for, viz: the *services* of the servant.

The facts alleged in the complaint do not bring the case within the principle governing cases involving the relation of master and servant, nor of those cases where a contract is procured to be broken by fraud, deceit, slander, or other actionable wrong, as in *Rice v. Manley*, and other cases above noted. It is conceded by appellant, and it is unquestionably true, that "one may advise a friend in all honesty, and without ill-will to the other contracting party, to abide the risks of breaking an onerous or mischievous contract, rather than those of performing it." In *Bowen v. Hall*, Law R. 6 Q. B. D. 338, Brett, L. J., said: "Merely to persuade a person to break his contract may not be wrongful in law or fact." This being true, will the fact that the advice or persuasion proceeds from malicious motives create a liability where the same advice or persuasion, if given from good motives, would not?

In considering this question, the distinction between civil and criminal proceedings must not be overlooked. In the dissenting opinion of Lord Coleridge, C. J., in *Bowen v. Hall*, Law R. 6 Q. B. D. 343, the question above presented is answered thus: "It is, I believe, also admitted, except by Sir William Erle, whom I think no one has ever followed, that if a man endeavors to persuade another to break his contract and succeeds in his endeavor, yet if he does this without what the law calls 'malice,' the damage which results, however great, is not in itself a cause of action, I mean, of course, a cause of action against him; but if the damage which is not in itself actionable, be joined to a motive which is not in itself actionable, the two together form a cause of action. This seems a strange conclusion. . . . I do not know, except in the case of *Lumley v. Gye*, 2 El. & B. 216, that it has ever been held that the same person for doing the same thing under the same circumstances, with the same result, is actionable or not actionable according to whether his inward motive was selfish or unselfish for what he did. I think the inquiries to which this view of the law would lead are dangerous and inexpedient inquiries for courts of justice; judges are not very fit for them, and juries are very unfit."

It is a truism of the law that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent; that what one has a right to do another cannot

complain of. It is conceded that one may lawfully persuade or procure another to break his contract with a third person, "if it be done from good motives." We think the qualification has no place in the proposition. If it is right, and the *means* used to procure the breach are right, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander or violence to effect the same purpose. Suppose A, by fraudulent representations, induces B to sell him a large quantity of goods on credit, intending to defraud B of the entire value of the goods; C, knowing that the representations are false, and not caring whether B shall lose his goods or not, but of unmixed malice and ill-will toward A, procures B to refuse to deliver the goods by truthfully informing B of the falsity of the representations made by A, will it be said that C is liable in an action brought by A? In Cooley on Torts, 2d ed., p. 832, the learned author says: "Bad motive by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. When in legal pleadings the defendant is charged with having wrongfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." Again the same author, at page 836, says: "Motive generally becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation, and is of the highest importance."

That the mere fact that one induces another to break a contract with a third person does not give a right of action, seems to have been directly decided in *McCame v. Wolff*, 28 Mo. App. 447, cited by appellant. The petition alleged that "by some means unknown to plaintiff" the defendant induced a third person to recede from a contract whereby the plaintiff lost commissions. The court said: "the demurrer was properly sustained. The petition charges neither malice nor fraud on defendant's part, and in the absence of both an action of this kind is not maintainable."

Lumley v. Gye, 2 El. & B. 216; *Bowen v. Hall*, Law R. 6 Q. B. D. 333, and *Walter v. Cronin*, 107 Mass. 555, are cited and largely relied upon by appellant. In *Lumley v. Gye*, plaintiff, the proprietor of a theatre, employed Miss Wagner to sing

in his theatre for a specified time. Defendant, knowing the premises, and maliciously intending to injure the plaintiff, enticed and procured Wagner to refuse to perform, by means of which enticement and procurement she wrongfully refused to perform, etc. Defendant demurred to the declaration. The court held that the relation of master and servant existed, and the decision was placed upon that ground; Crompton, J., saying, however, that he did not wish to be considered as deciding "or as saying that in no case except that of master and servant is an action maintainable for *maliciously* inducing another to break a contract, to the injury of the person with whom such contract has been made." Mr. Justice Coleridge (now Lord Chief Justice of England) dissented in a long and able opinion, holding that the relation of master and servant did not exist within the intent of the statute of laborers of 23 Edw. 3, in which he said the law in relation to the seduction of servants had its origin; and as to the broader proposition argued by counsel and referred to by Crompton, J., concluded: "Merely to induce or procure a free contracting party to break his covenant, *whether done maliciously or not*, to the damage of another, for the reasons I have stated, is not actionable."

In *Bowen v. Hall*, Law R. 6 Q. B. D. 333, a contract for skilled labor, the case was decided in the appellate court upon the authority of *Lumley v. Gye*, Lord Coleridge again dissenting. The opinions of the majority of the court go far to sustain the broad proposition contended for by the appellant here. *Lumley v. Gye* was declared by Lord Coleridge, in the latter case, to stand alone. The reasoning in the dissenting opinions in those cases seems conclusive and satisfactory.

Walker v. Cronin, 107 Mass. 555, was also a case of enticement of laborers. The question arose upon demurrer. The court held, after stating the declaration: "This sets forth sufficiently. 1. Intentional and wilful acts. 2. Calculated to cause damage to the plaintiffs in their lawful business. 3. Done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant; which constitutes malice; and 4. Actual damage and loss resulting." This case does not seem to be based upon the relation of master and servant, or that of a contract for personal services, but

unless it can be sustained upon that ground (a point not necessary to consider) the decision is clearly wrong.

In *Payne v. Railroad Co.*, 13 Lea, 507; 49 Am. Rep. 666, plaintiff, a merchant, had a large and profitable trade with defendant's employee. Defendant circulated a notice to the effect that any of its employees who, after that date, traded with plaintiff, would be discharged. This, it is alleged, was done maliciously, whereby plaintiff was damaged. The court held that an act not unlawful, done in a manner not unlawful, though from wicked and malicious motives, and causing injury, is not actionable. That no contract existed between the merchant and the employees does not affect the principle involved. 2 Greenleaf on Evidence, section 453, defines a malicious act: "In a legal sense, any *unlawful act*, done wilfully and purposely to the injury of another is, as against that person, malicious."

Two cases recently decided by the Supreme Court of Kentucky fully sustain our conclusion. *Boulrier v. Macauley*, 15 S. W. Rep. 60, was a stronger case than *Lumley v. Gye*, as the dramatic performer was not only induced to violate her agreement with plaintiff, but to perform in defendant's theatre instead. It was held that defendant was not liable. The other case, *Chambers v. Baldwin*, 15 S. W. Rep. 57, was for procuring a third party to break his contract for the sale of a crop of tobacco. The complaint was demurred to. The questions presented, as stated by the court, are: "1. Whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it. 2. Whether an act lawful in itself can become actionable solely because it was done maliciously." The judgment of the court below sustaining the demurrer was affirmed.

Jones v. Stanly, 76 N. C. 355, cited by appellant, directly sustains appellant's contention, but the decision is based upon *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, (the only case cited,) which case involved the relation of master and servant, and was decided by a divided court.

It may be questioned whether the omission to allege that Thorn knew of the contract between appellant and Newlands is not fatal to the complaint, but, as we conclude that the demurrer was properly sustained upon the principal point made, it is not necessary to consider it.

We are of the opinion that the judgment appealed from should be affirmed.¹

RECEIVER OF ERRONEOUS TELEGRAM.

N. Y. & W. P. Tel. Co. v. DRYBURG.

(35 Penn. St. 298. — 1860.)

IN ERROR. This was an action on the case by P. Dryburg against the New York and Washington Printing Telegraph Company, for “carelessly, erroneously and untruly transmitting to him a message from Robert Le Roy. Le Roy, a resident of New York, delivered to said company at that place a message to be sent over their telegraph line by them to Dryburg, a florist in Philadelphia, directing the latter to send him “two hand bouquets.” The message as received by Dryburg read “two hundred bouquets.” The message was received from Le Roy by the company upon the following terms and conditions: “To provide against mistakes in the transmission of messages, every message of consequence ought to be repeated, by being sent back from the office at which it is to be received to the office from which it is originally sent.” “The company will not be liable for any loss or damage that may ensue, by reason of any delay, or mistakes in the transmission or delivery, or from non-delivery of unrepeatd messages, but only engage to use reasonable efforts to secure the services of competent and reliable employees, so as to have their business transacted in good faith. . . . Nor will the company be responsible for mistakes in the transmission, nor delay in the transmission or delivery, nor for non-transmission, nor non-

¹ (*Bohn Mfg. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, *accord.* *Jackson v. Stanfield*, 36 N. E. 345, (Ind. 1894,) *contra.*) In *Tasker v. Stanley*, 153 Mass. 148, the action was for procuring and enticing the plaintiff's wife to live separately from him. There was no evidence that defendant spoke any falsehoods, or that his conduct was unlawful for any other reason than its tendency to produce a separation. “In order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives; and so are all the cases.”

delivery of any repeated message to any extent beyond ten dollars, unless it be insured." The message was not insured nor repeated. Defendants alleged that the word "hand" in the original message was written "hund," and proved that the operator who transmitted it was careful and skilful. Judgment for one hundred dollars for plaintiff. Defendants remove the case to this court on a writ of error.

W. S. Price for the plaintiff in error.

Guillon for the defendants in error.

WOODWARD, J. The telegraph company did not send Le Roy's message as he wrote it. If written as the company's agent read it, the word "hand" was written "hund"; and if the company had sent the word "hund" to Dryburg they would have been in no fault. Their agent, however, assumed that hundred was meant, and accordingly added the three letters "red," which did all the mischief. We do not understand that there was any dot after the letters "hund," to indicate a contraction; so that the agent's inference that "hundred" was the word meant was entirely gratuitous.

The wrong, then, of which the plaintiff complains, consisted in sending him a different message from that which they had contracted with Le Roy to send. That it was a wrong is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is intrusted to them, their obligations, as far as they reach, spring from the same sources, — the public nature of their employment and the contract under which the particular duty is assumed. One of the plainest of their obligations is to transmit the very message prescribed. To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office.

But when they violate this duty, whether negligently or wilfully, are they responsible to the party to whom the erroneous message is addressed? That is the exact question upon this record. That the defendants would be responsible to Le Roy, and that he would be responsible over to Dryburg, are not contested, though perhaps not conceded, points; but that

the company are liable to Dryburg is resisted on several grounds.

In the first place, it is said that the case belongs to that class of torts in which malice is the gist of the action. This is a mistake. The *narr.* lays the duty to transmit the message as it was received, and assigns, as the breach, that it was transmitted "erroneously, untruly and carelessly." No malicious intent is alleged, nor was it necessary that one should be alleged or proved. It is enough that negligence is charged and proved. It is settled, upon abundant authority, that incorporated companies may be sued in their corporate character, for damages arising from their neglect of duty, and for trover. (1 Ch. Pl. 68; *Chestnut H. & S. II. Turnpike Co. v. Rutter*, 4 Serg. & R. 6; 8 Am. Dec. 675; *Fowle v. Common Council of Alexandria*, 3 Pet. 409; *Bushel v. Commonwealth Insurance Co.*, 15 Serg. & R. 173.) And a corporation is liable in tort for the tortious act of its agent, though the appointment of the agent be not under seal, if the act be done in the ordinary service. (*Smith v. Birmingham Gas Light Co.*, 1 Ad. & El. 526.)

Apart, however, from corporation law, it is said, in the next place, that, upon the general principles of agency, the company can be held answerable to Le Roy only. That the relation of principle and agent existed between him and the company, there can be no doubt; but I do not think it equally clear that the relation was not established between Dryburg and the company. Telegraph companies are, in some sort, public institutions — open alike to all; and are largely used in conducting the commerce of the country. The banks decline to act upon their authority, and, doubtless, individuals may also decline; but when a man receives a message at the hands of the agent of such a company, and does act upon it, especially if, as Dryburg did, he use the same medium for responding to the message, it seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives, as of him who sends, the message. In point of fact, the fee is often paid on delivery; and I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the wire.

But, however this may be, regarding the company as alone the agent of the sender of the message, is it to be doubted that an agent is liable for misfeasance, even to third parties? For nonfeasance, I agree, the agent is responsible only to his employer, because there is no privity of consideration betwixt the agent and a third party. The remedy in such cases must be sought in the maxim *respondeat superior*; but even to this rule there is an exception in the instance of masters of ships, who, although they are the agents or servants of the owners, are also, in many respects, deemed to be responsible as principals to third persons, not only for their own negligences and nonfeasances, but for those of subordinate officers and others employed under them. The general rule, however, was laid down by Lord Holt, in *Lane v. Sir Robert Cotton*, 12 Mod. 488, in these words: "A servant, or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrongdoer." (S. C. 1 Ld. Raym. 646.) The compilers have taken the rule from this source, and the cases cited by them show that it has generally been followed. (See Paley on Agency, 396 *et seq.*; and Story on Agency, secs. 308, 309, 314, 315 and the cases in notes.)

The case of *Camp v. Western Union Telegraph Co.*, 1 Metc. (Ky.) 164, does not affect this principle, as we apply it here, for there the action was by the sender of the message, and it appeared that the message was sent subject to the express condition that defendant would not be liable for mistakes arising from any cause, unless the message was repeated by being sent back. This company had such a rule also; but they charge fifty per cent advance upon the usual price of transmission, where the sender demands that the message be repeated back to the first operator, and Le Roy did not pay it. If it be granted that, in consequence of his not purchasing this security against mistakes, he could not hold the company liable, it does not follow that Dryburg cannot. He did not know whether the message had been repeated back to Le Roy or not. He received it as the company delivered it to him, and it is very material to observe that the mistake was not due

to what has been called the infirmities of telegraphing, but to the improper liberties which the operator took with the text before him. The magic power which presides over the wires performed its duty faithfully, and bore the very message it was bidden to bear, but the human agent sent a different message from that which he was commanded to send. This is the misfeasance the plaintiff complains of.

The company claimed that their operator was a skilful and careful one. Then his negligence in this instance was the more apparent and inexcusable. If the handwriting was so bad that he could not read it correctly, he should not have undertaken to transmit it; but the business of transmission assumed, it was very plainly his duty to send what was written. It was no affair of his that the message would have been insensible. Messages are often sent along the wires that are unintelligible to the operator. When he presumed to translate the handwriting, and to add letters which confessedly were not in it, he made the company responsible to Dryburg for the damages that resulted from his wrong-doing.

We do not conceive it necessary to go any farther in the discussion of this case. There are several errors assigned to which we have not specifically alluded, but we see nothing in them to require a reversal of the judgment.

*Judgment affirmed.*¹

¹ Proof of delivery to telegraph company of a message and that it was inaccurately or not promptly delivered makes out a *prima facie* case of negligence. (*Pearsall v. W. U. T. Co.*, 124 N. Y. 256.) Such company may exempt itself from liability for ordinary negligence of its servants, by special contract, but not by notice unless brought to personal knowledge of the sender. *Ibid.*

Some state courts hold that a telegraph company is liable in damages for failure to deliver a cipher dispatch as if the message had been intelligible. (*W. U. T. Co. v. Reynolds*, 77 Va. 173; 46 Am. R. 715; *W. U. T. Co. v. Ilyer*, 22 Fla. 637; 1 Am. St. R. 222; 1 So. R. 129; contra, *U. S. T. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; see 81 Am. Dec. 607, n.)

Whether damages can be recovered for mental anguish solely caused by negligence of the telegraph company is differently answered by our state courts. *West v. W. U. T. Co.*, 39 Ks. 93; 17 Pac. 807; holds that they are not recoverable. *Chapman v. W. U. T. Co.* (Ky. 1890) 13 S. W. 880, holds that they are recoverable. The latter case also holds that the loss of a note which plaintiff alleged his father would have given him, had he been able to see his father before the latter's death, is a consequence too remote to sustain a claim for damages.

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